IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 278

ROGER TOUHY,
Petitioner,
vs.
PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

EDGAR B. TOLMAN,
THOMAS I. MEGAN,
HOWARD B. BRYANT,
Attorneys for Petitioner.

BARNARD & MILLER, Printers, FRAnklin 0562, CHICAGO

SUBJECT INDEX.

Petition for Certiorari.

Brief.

Table of Cases.

Statutes.

United States.

Illinois.

Constitution.

Rules.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. .....

ROGER TOUHY,
Petitioner,
vs.
PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Roger Touhy, respectfully shows unto the Court the following:

I.

STATEMENT OF THE MATTER INVOLVED.

1. The Hamm case.

In 1933 your petitioner was charged with having kidnapped one Alfred Hamm, Jr. The case came on for trial in a district court of the United States for the District of Minnesota. On the trial of that case the jury found your petitioner not guilty.

Your petitioner has always contended that he was not guilty of that offense and that the indictment was due to the activities of petitioner's enemies. The real kidnappers of Hamm confessed two years later. (R. 6) During the trial of the *Hamm* case at St. Paul in 1933, the Cook County grand jury indicted petitioner for the supposed kidnapping of the notorious John "Jake the Barber" Factor. (R. 7, 11) After his acquittal in St. Paul petitioner waived extradition and returned to Chicago to face his accusers in the Factor case.

2. The Factor "Kidnapping" case.

The first trial of that case terminated when the Judge discharged the jury at a time when they stood 10 to 2 or 8 to 4 for petitioner's acquittal. (R. 7) Thereafter a second trial took place which resulted in a verdict of guilty.

On February 24, 1934 the trial court entered judgment on the verdict and petitioner stood convicted in the Criminal Court of Cook County, Illinois of kidnapping John Factor for ransom. (R. 2)

Petitioner sued out a writ of error in the Supreme Court of Illinois. That Court affirmed the conviction. (*People* v. *Touhy*, 361 Ill. 332.)

3. The Habeas Corpus case.

In 1938 petitioner sought release by a petition for habeas corpus in the Supreme Court of Illinois but that Court without opinion denied him leave to file the petition. This Court denied certiorari, (*Touhy* v. *Ragen*, 303 U.S. 657).

4. The Newly Discovered Evidence.

In October 1934, Factor told Thomas C. McConnell, a prominent member of the Chicago Bar, that he had not

been able to see anyone during the holding for ransom but that he swore to the identification of Touhy "anyway." (R. 3) Petitioner's counsel in this proceeding, Charles P. Megan, who has now departed this life, learned of this confession of perjury by the state's principal witness, in October 1945 during a conversation with Mr. McConnell and communicated this fact to petitioner some time later. (R. 3).

In the Petition for Writ of Error Coram Nobis it is alleged that Factor had obtained by fraud $7,500,000 from British investors and fled to the United States, (R. 3); that Thomas C. McConnell was retained by Factor's British victims to bring legal proceedings against Factor in the United States courts; that that suit was settled by paying to the British investors or some of them $1,300,000 and the civil action in this country was dismissed; that after that suit against Factor was settled, Factor asked McConnell to go to England for the purpose of securing the dismissal there of the criminal proceedings against him for which an extradition warrant for his return to England was outstanding; that McConnell declined to do this, and Factor went on to tell of his false identification of petitioner at the kidnapping trial as above stated. (R. 3) This confession of perjury was some eight months after the trial in the Factor "kidnapping" case. (R. 3)

Petitioner urges that this confession by Factor completely undermines the entire case on which the prosecution of Roger Touhy was based. The state has admitted that Factor's testimony identifying petitioner was "indispensable" in the trial, (R. 15) and Factor himself considers that his testimony resulted in the petitioner's conviction. (R. 14) Thus Factor stated in a recent petition to this Court for a writ of habeas corpus whereby he sought release from imprisonment for mail fraud as fol-

lows: "The testimony of your petitioner against said Touhy resulted in the conviction of Touhy in the Criminal Court of Cook County, Illinois for the kidnapping of your petitioner, by reason of which said Touhy was sentenced to the equivalent of a life sentence in the Illinois State Penitentiary." (R. 14-15)

5. The Error Coram Nobis case.

The Factor confession of perjury is the central point in the present case in which petitioner on August 10, 1946 brought his sworn Petition for a Writ of Error Coram Nobis in the court of his conviction seeking a hearing on the allegations above set forth, and others referred to below, to the end that he be granted a new trial in which the newly discovered evidence might be introduced, and in which he might have a fair trial with due process of law. The Criminal Court of Cook County dismissed the Petition for a Writ of Error Coram Nobis, without a hearing thereof, solely on the grounds advanced by the state, namely, that the five year limitation in the statutory substitute for the writ of error coram nobis in Illinois, (R. S. Ill. Chap. 110, Sec. 196) was a bar to the petition since that limitation applied to criminal proceedings and more than five years had elapsed since the date of petitioner's conviction. (R. 113) The court also sustained the state's demurrer to the petition. (R. 113) On appeal, the Supreme Court of Illinois affirmed the dismissal of the petition holding that the statutory five-year limitation on coram nobis was a complete bar (R. 120) and that error coram nobis was not available in Illinois for the presentation of newly discovered evidence of perjury on the trial. (R. 121)

Petitioner claims that by holding that the Petition for Writ of Error Coram Nobis is barred by the statute of limitations contained in Section 72 of the Illinois Civil

Practice Act and that in proceedings for the writ of error coram nobis, newly discovered evidence could not be presented to the Court, the Supreme Court of Illinois deprives the petitioner of the right, assured by the Constitution of the United States, to an ancient and still existing remedy for the review of a case in which the judgment of conviction has been based on perjured testimony.

Petitioner now seeks a review of that decision by this petition for a writ of certiorari from the Supreme Court of the United States to the Supreme Court of the State of Illinois.

The allegations deemed insufficient in prior appeals did not include the newly discovered evidence of perjury by the principal witness, Factor. As above stated, this confession of perjury was first brought to the attention of any court in the present Petition for a Writ of Error Coram Nobis, and no hearing has ever been had thereon except as above stated.

The petition in the error coram nobis proceeding also sets forth in detail the perjury of the only other two witnesses at the trial who identified petitioner, (R.8,9,10). And further the petition in the error coram nobis proceeding sets forth that the prosecuting officials caused to be introduced in evidence at the trial testimony of Factor and the other two identifying witnesses knowing, or with reasonable means of knowing, that their testimony was unworthy of belief. (R.11)

And so, the Court is here presented with a petition which has been denied by the Illinois courts without hearing but which shows that on the trial petitioner was denied rights assured to him by the Constitution of the United States. As elsewhere stated and here repeated, the matter

here involved is a plea for a fair trial in Illinois, something your petitioner has never had. Petitioner refers to his sworn allegations in the petition for Writ of Error Coram Nobis and in other parts of the records in the various proceedings which make up the history of this case.

II.

BASIS OF THIS COURT'S JURISDICTION.

The jurisdiction of this Court is invoked under that part of Section 237(b) of the Judicial Code of the United States (U.S.C. Title 28, Sec. 344 (b)) reading as follows:

> (b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination . . . any cause wherein a final judgment or decree has been rendered . . . by the highest court of a State in which a decision could be had where . . . any . . . right, privilege or immunity is specially set up or claimed by either party under the Constitution . . .

Petitioner raised substantial federal questions in his Petition for Writ of Error Coram Nobis in the Criminal Court of Cook County, stating under oath:

(1) That he has been denied the equal protection of the laws and deprived of his liberty without due process of law. (R. 10)

(2) That his conviction was based on the false testimony of the principal witness, Factor. (R. 2)

(a) That Factor has now confessed to this perjury. (R. 2)

(b) That knowledge of this perjury and confession

did not come to petitioner until after it had come to the knowledge of his counsel, Charles P. Megan, who informed petitioner of this newly discovered evidence in 1945, eleven years after his conviction. (R. 3)

(3) That the perjured testimony of Factor, Costner and Henrichsen (the only witnesses at the trial who identified petitioner (R. 9)) was introduced in evidence at the trial by representatives of the State of Illinois, knowing, or with reasonable means of knowing, that no one of these three men could be believed under oath and that their testimony was false. (R. 11)

Rule 12 of this Court requires a showing that the questions involved are "substantial". Surely a conviction and sentence of imprisonment in a penitentiary for 99 years on perjured testimony shows, without more, that substantial questions are here involved. The fact that petitioner has exhausted every remedy under Illinois law for his application for a new trial, without avail and without securing an opportunity to demonstrate that perjury presents further grounds for believing the questions involved to be substantial. And lastly, it is a substantial question, to one who claims protection of rights vouchsafed by the Federal Constitution, whether the Supreme Court of the United States may review convictions where the law of a state has been so interpreted by the highest court of that state as to leave petitioner remedyless in the courts of that state for a violation of those rights.

The court of first instance on October 24, 1946, sustained the state's plea of the statute of limitations in bar of the right of action. That decision was based on the five year limitation contained in the statute which abolished the writ of error coram nobis and provided a substitute for that writ (Illinois Civil Practice Act, Section 72 [R. S.

Ill. Chap. 110, Sec. 196] (R. 113)). The statutory provision is set out in the margin.*

The lower court also sustained the State's demurrer and dismissed the petition. (R. 113)

The Supreme Court of Illinois on March 19, 1947, affirmed the lower court's decision, *People* v. *Touhy*, 397 Ill. 19. See Appendix at pages 11 to 19 post. The Supreme Court of Illinois held that the five year limitation was a complete bar to the petition (R. 120) (pp. 17-18 post) and that the writ of error coram nobis was not available as a remedy herein. (pp. 18-19 post) (R. 121) Although in his Petition for Rehearing in the Supreme Court of Illinois, petitioner set forth that this decision deprived him of his fundamental rights under the United States Constitution (R. 128), the Supreme Court of Illinois on May 19, 1947, denied that petition. (R. 129)

III.

THE QUESTIONS PRESENTED.

The questions presented to the Court are:

1. Whether, under the Constitution of the United States, the courts of Illinois are required to provide a corrective judicial process and grant petitioner a hearing on the merits of his petition for a new trial where:

(a) newly discovered evidence of perjury at the trial is of such a character as completely to under-

---

* "The writ of error *coram nobis* is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice."

mine the entire case on which the prosecution was based;

(b) the representatives of Illinois responsible for the prosecution of petitioner, caused to be introduced into evidence at the trial testimony which they knew, or had reasonable means of knowing, to be false;

2. Whether the Supreme Court of Illinois deprived the petitioner of all remedy for unlawful deprivation of his liberty through its holding that the correction of errors under a writ of error coram nobis was barred by the time limitation contained in the Act which created a substitute remedy for that writ?

3. Whether the Supreme Court of Illinois deprived the petitioner of all remedy for unlawful deprivation of his liberty through its holding that newly discovered evidence could not be received in a proceeding for a writ of error coram nobis?

4. Whether, since the petitioner has exhausted all remedies under the law of Illinois as interpreted by the Illinois Supreme Court, the petitioner is entitled to have a review by certiorari in the Supreme Court of the United States of the action of the Illinois courts in denying his rights under the Federal Constitution and whether this Court should not now in this proceeding administer the appropriate remedy for the protection of those federal rights by reversing the judgment below and ordering a new trial of the charge of kidnapping?

IV.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

The courts of Illinois have declined to hear petitioner's case on the merits. In so doing they have deprived him of fundamental rights to a fair trial under the Federal Constitution and have decided federal questions in a way not in accord with applicable decisions of this Court.

The Supreme Court of Illinois based its affirmance of the lower court's dismissal of the Petition for a Writ of Error Coram Nobis on the grounds that the time limitation in the statutory substitute for this writ in Illinois was a complete bar to the action (R. 120) and that the writ is not available in Illinois for newly discovered evidence. (R. 121) In spite of the strong case made on this record, the decision effectively closes the door to all relief for this petitioner in the state courts. The writ of error coram nobis was his last remaining avenue for relief in the Illinois Courts—the only remedy whereby he might have obtained his constitutional right to a hearing and to a fair trial. That relief has been denied him. Petitioner has stated in his sworn Petition for a Writ of Error Coram Nobis that Factor, the state's principal witness at the trial, has confessed that although he did not see petitioner he swore to his identification at the trial anyway. (R. 2) Knowledge of this confession of perjury came to the petitioner in 1945 through his then counsel, Charles P. Megan. (R. 3) The confession is of such a character as completely to undermine the entire case on which the prosecution was based.

ROGER TOUHY,
By EDGAR B. TOLMAN,
THOMAS I. MEGAN,
HOWARD B. BRYANT,
His Attorneys.

APPENDIX

397 Ill. 19.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

vs.

ROGER TOUHY,
Appellant.

Opinion filed March 19, 1947,

Rehearing denied May 19, 1947.

MR. JUSTICE WILSON delivered the opinion of the court:

February 24, 1934, a jury in the criminal court of Cook county found Roger Touhy guilty of the crime of kidnapping John Factor for ransom and fixed his punishment at ninety-nine years' imprisonment in the penitentiary. Judgment was rendered on the verdict. Touhy prosecuted a writ of error from this court to the criminal court. On June 14, 1935, the judgment was affirmed and, on October 2, 1935, a petition for rehearing was denied. (*People* v. *Touhy*, 361 Ill. 332.) Thereafter, on February 15, 1938, Touhy presented his petition for a writ of *habeas corpus* to this court. (*People ex rel. Touhy* v. *Ragen*, No. 24616.) The petition was denied on February 18, 1938. The United States Supreme Court, on March 28, 1938, denied his petition for a writ of *certiorari* to this court. (*Touhy* v. *Ragen, Warden*, 303 U.S. 657.) On August 10, 1946, Roger Touhy filed in the criminal court of Cook County a petition for a writ of error *coram nobis* seeking a new trial. The People interposed a plea in bar setting up the five years' limitation period and, also, a demurrer. The plea and the demurrer were both sustained, and Touhy's petition dismissed. This appeal followed.

We deem unnecessary a narration of all the detailed

facts alleged in the petition. Our opinion in *People* v. *Touhy*, 361 Ill. 332, contains an exhaustive review of the evidence adduced upon the trial. John Factor identified Roger Touhy as one of the kidnappers. The latter's conviction rested, in large measure, upon the testimony of Factor, Isaac Costner and Walter Henrichsen. The principal ground urged by Touhy in his petition for a writ of error *coram nobis* is that the testimony of Factor, Costner and Henrichsen was false. In particular, the petition alleges that, in October, 1934, Factor told Thomas C. McConnell, a Chicago lawyer, he had not been able to see anyone during the holding for ransom on account of a bandage over his eyes, but, nevertheless, swore to the identification of Touhy. This alleged statement is consistently referred to in the petition and in Touhy's briefs as a confession. Additional allegations are that Factor's statement to McConnell did not come to the knowledge of Touhy's counsel until October, 1945, and to the knowledge of Touhy himself still later. Touhy also alleges that Costner's testimony upon the trial was false. Henrichsen is now deceased, and statements are made in Touhy's brief that "his evidence was unimportant" and "The false testimony of Henrichsen was not of great significance."

The gist of the principal contentions made by Touhy's petition is that his conviction rests upon Factor's false identification of him as one of the perpetrators of the kidnapping and the supporting testimony of Costner, also charged to be false, and upon the asserted arbitrary action of the trial judge in refusing to allow a reasonable time for Touhy's counsel to prepare for the argument of his motion for a new trial. As stated in Touhy's brief, "This confession of perjury by the principal witness [Factor] is the central point of the case. The newly discovered evidence is 'of such character as completely to undermine the entire case on which the prosecution was based'."

An examination of the petition for *habeas corpus* filed in this court, more than eight years before instituting the present action, discloses that Touhy alleged Factor's testimony in the trial upon the indictment for kidnapping was false, and, also, that Costner committed perjury upon the trial. He averred that knowledge of the facts alleged first came to him immediately preceding February 14, 1938. The petition for *habeas corpus* was supported by eleven affidavits. The present petition for a writ of error *coram nobis* is not supported by a single affidavit.

As recounted, the People filed a plea in bar placing reliance upon section 72 of the Civil Practice Act and, also, a demurrer averring that the allegations of the petition, to the effect that Touhy's conviction resulted from the contrivances of the prosecuting witness, John Factor, and the false testimony of Factor and Costner are not matters or grounds for relief in the present action; that allegations on rulings with respect to the evidence, the time for considering the motion for a new trial and that new evidence has been discovered are not matters relievable by an action in the nature of a writ of error *coram nobis* and, further, that allegations as to violations of Touhy's rights in the criminal trial are not within the purview of the matter for which the writ lies.

Although petitioner captions his pleading a "Petition for Writ of Error Coram Nobis," we treat it as a motion in the nature of a writ of error *coram nobis*. Eighty years ago, in 1867, this court, in *McKindley* v. *Buck*, 43 Ill. 488, speaking through Mr. Justice Breese, observed: "This old writ [writ of error *coram nobis*] has never been in use in this State, and it has fallen into desuetude even in England. Its place is most effectually supplied by the more summary proceedings, by motion in the court where the error in fact occurred." Shortly after this decision

was rendered, the General Assembly expressly abolished the common-law writ of error *coram nobis*. (Laws of 1871-72, p. 348.) Its abolition appeared as section 66 in an act entitled, "An Act in regard to practice in courts of record." The Practice Act of 1907, as did earlier statutes, declared "The writ of error *coram nobis* is hereby abolished," (Smith-Hurd Stat. 1933, chap. 110, par. 89,) and section 72 of the Civil Practice Act, now in force, (Ill. Rev. Stat. 1945, chap. 110, par. 196,) provides: "The writ of error *coram nobis* is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, *non compos mentis* or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years." The power of the legislature to abolish the common-law writ of error *coram nobis* is not open to question. "An Act to revise the law in relation to the common law," approved March 5, 1874, ordains that the common law of England, so far as applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply defects of the common law, prior to the fourth year of James the First, (with certain exceptions not material here,) and which are of a general nature and not local to that kingdom, "shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority." (Ill. Rev. Stat. 1945, chap. 28.) The legislative authority to abolish the common-law writ of error *coram nobis* has been repeatedly exercised.

Touhy contends that the five years' limitation period in section 72 of the Civil Practice Act is inapplicable to criminal cases. This contention and the supporting argument are based upon the fallacious premise that proceedings upon motions in the nature of a writ of error *coram nobis* are criminal proceedings when the motions are sequels to judgments rendered in criminal cases. Touhy does not make the contention that section 72 of the Civil Practice Act is unconstitutional but urges that an interpretation applying the statute to petitions or motions in the nature of a writ of error *coram nobis* in criminal cases would render the section unconstitutional. The precise point advanced is that if section 72 applies to criminal proceedings, it would violate section 13 of Article IV of our constitution, providing that no act shall embrace more than one subject and that it shall be expressed in the title.

The purpose of the writ of error *coram nobis* at common law, and of the motion substituted for it by section 72, is to bring before the court rendering the judgment matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition. (*Linehan* v. *Travelers Ins. Co.*, 370 Ill. 157; *Chapman* v. *North American Life Ins. Co.*, 292 Ill. 179; *Cramer* v. *Illinois Commercial Men's Ass'n.*, 260 Ill. 516.) Illustrative of such matters are the disability of the parties to sue or defend, namely, death of one or more of the parties, death of a joint party, infancy, coverture and insanity, the failure of the clerk to file a plea or answer, and the omission to interpose, through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the facts in the case. (*Jacobson* v. *Ashkinaze*, 337 Ill. 141; *Marabia* v. *Mary Thompson Hospital*, 309 Ill. 147; *Chapman* v. *North American Life Ins. Co.*, 292 Ill. 179.) On the other hand,

the motion in the nature of a writ of error *coram nobis* does not lie to determine a question of fact which has been adjudicated, even though decided wrongly, nor for alleged false testimony at the trial nor for newly discovered evidence. *People* v. *Drysch,* 311 Ill. 342.

A motion in the nature of a writ of error *coram nobis* is an appropriate remedy in criminal cases, as well as civil. The statute cotemplates the filing of a motion or petition in the nature of a writ of error *coram nobis* in the first instance in the court rendering the judgment assailed. The motion or petition is the filing of a new action and is civil in its nature. (*People* v. *Dabbs,* 372 Ill. 160; *People ex rel. Courtney* v. *Green,* 355 Ill. 468.) The statutory substitute, namely, a petition or motion in the nature of a writ of error *coram nobis* has been adjudged an appropriate remedy in criminal cases, as well as civil, and lies to set aside a conviction obtained by duress or fraud, or where, by some excusable mistake or ignorance of the accused and without negligence on his part, he has been deprived of a defense which he could have used on his trial, and which, if known to the court, would have prevented conviction. (*People* v. *Dabbs,* 372 Ill. 160; *People* v. *Green,* 355 Ill. 468.) In *People* v. *Crooks,* 326 Ill. 266, this court said: "The writ of error *coram nobis,* or a motion under said statute, [section 89 of the Practice Act of 1907,] is an appropriate remedy in criminal cases as well as in civil cases. * * * The sufficiency of the motion, which is regarded as a declaration in a writ of error *coram nobis,* or a motion under the statute, must be raised upon demurrer, plea of *nullo est erratum,* by motion to dismiss, by pleading special matter in confession and avoidance, or by making an issue of fact by traversing the declaration. [Citations.] In this State the issue of fact may be made, and is generally made, by affidavits in

support of the motion and by counter-affidavits denying the facts set up in the motion and affidavits in support thereof, in which case the burden of proof is upon the party making the motion to prove his facts alleged by a preponderance of the evidence. * * * The proceedings in a criminal case are civil in their nature, and the burden is upon the accused to prove his allegations by a preponderance of the evidence." Again, in *People* v. *Green,* 355 Ill. 468, this court declared that section 89 of the Practice Act did not abolish the essentials of the proceeding under the common-law writ of error *coram nobis,* but that errors such as might have been corrected by the old writ may now be reached by a motion or petition, saying, "It is generally recognized that the proceedings under a motion or petition in the nature of a writ of error *coram nobis* are civil in their nature," and that the statutory motion substituted for the writ of error *coram nobis* is an appropriate remedy in criminal as well as civil cases. This pertinent observation was added, "Since the judgment entered upon such proceeding is final and the proceeding is civil in its nature, either the State or the defendant is entitled to a review of the judgment of the court entered on such motion or petition."

The common law writ of error *coram nobis* and the motion substituted for the old writ by section 72 of the Civil Practice Act are essentially civil in character. This being so, the contention that the present cause is a criminal proceeding cannot stand, and the argument that section 72 is inapplicable to the motion when employed in the criminal court of Cook county must, likewise, fall. We adhere in our decision in *People* v. *Rave,* 392 Ill. 435, that the five years' limitation under section 72 of the Civil Practice Act applies to all *coram nobis* proceedings. In the *Rave case* we pointed out that the language

in the concluding sentence of section 72, "When the person entitled to make such motion shall be an infant, *non compos mentis* or under duress at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years," contemplates criminal, as well as civil proceedings, because of the exclusion from the period of limitation of such time as the person entitled to make the motion may be under disability or duress. We stated that the language to the effect that the period of five years commences at the time "of passing judgment" can have application only to a criminal case. Upon the authority of *People* v. *Rave*, 392 Ill. 435, and *People* v. *Sprague*, 371 Ill. 627, section 72 of the Civil Practice Act is an insuperable bar to Touhy's petition filed August 10, 1946. Legislative power in this regard is not now a debatable constitutional question. *Bradford Supply Co.* v. *Waite*, 392 Ill. 318.

The disposition of the demurrer to the petition was likewise correct. To the end of avoiding any misunderstanding of this opinion, we are impelled to make additional observations. The petition is not supported by affidavits of either the lawyer to whom John Factor is alleged to have stated that he committed perjury upon the trial in the kidnapping case, or of Factor himself. The allegations, so far as the alleged false testimony of Factor is concerned, are hearsay statements of the highest degree. We do not regard the allegations in the petition as having been taken as true, even for the purpose of disposing of the demurrer. The rule that facts stated in a pleading will be taken as true on a motion to strike, does not extend to conclusions drawn by the pleader. (*Kurtzon* v. *Kurtzon*, 395 Ill. 73.) Paragraph (3) of section 43 of the Civil Practice Act (Ill. Rev. Stat. 1945, chap. 110, par. 167,) declares, "An answer containing only defenses to the jurisdiction or in abatement shall not constitute an ad-

mission of the facts alleged in the plaintiff's complaint." A petition, as here based on a claim of perjury but not supported by affidavits showing the perjury, does not allege facts but merely conclusions of the pleader based on hearsay matter. Construing the allegations of the petition most favorably to Touhy, to the extent that they charge John Factor, Costner and Henrichsen with testifying falsely upon the trial, they are hearsay and cannot be said to constitute facts.

Irrespective of whether the allegations of the petition be taken as true for the sole purpose of disposing of the demurrer, the contention is not well taken that the common-law writ of error *coram nobis*, or its statutory substitute in this State, is available as a remedy for newly discovered evidence or for alleged perjured testimony. We have this day, in *People* v. *Gleitsman*, No. 29957, reaffirmed this court's adherence to the rule that writ of error *coram nobis* does not lie to correct false testimony, nor for newly discovered evidence.

This court, in 1934, thoroughly reviewed the record upon the writ of error sued out of this court to the criminal court of Cook County seeking a reversal of the judgment of conviction on the charge of kidnapping John Factor. (*People* v. *Touhy*, 361 Ill. 332.) In 1938, we carefully considered the petition for *habeas corpus* (*People ex rel. Touhy* v. *Ragen*, No. 24616,) and the Supreme Court of the United States denied a petition for a writ of *certiorari* seeking a further review. (*Touhy* v. *Ragen, Warden*, 303 U.S. 657.) The present proceeding has received full consideration by both the trial judge and this court. In each instance, Touhy has been represented by able and experienced counsel both in the trial courts and in the courts of review.

The judgment of the criminal court of Cook County is right, and it is affirmed.

JUDGMENT AFFIRMED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. .....

ROGER TOUHY,
Petitioner,
vs.
PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

THE OPINION BELOW

The opinion of the Supreme Court of Illinois in this case (the error coram nobis case) is reported in the Illinois official reports as *The People of the State of Illinois* v. *Touhy*, 397 Ill. 19. It also appears in the appendix to the petition for certiorari at pages 11 to 19, *supra* and in the record at pages 115 to 122.

GROUNDS OF JURISDICTION.

The jurisdiction of this Court is invoked under that part of Section 237 (b) of the Judicial Code of the United States (U.S.C. Title 28, Sec. 344(b)) reading as follows:

> (b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it

> for review and determination . . . any cause wherein a final judgment or decree has been rendered . . . by the highest court of a State in which a decision could be had where . . . any . . . right, privilege or immunity is specially set up or claimed by either party under the Constitution . . .

The rights, privileges and immunities of which the petitioner Roger Touhy has been deprived are the rights referred to in the following provision of the United States Constitution the relevant parts of which are as follows:

> FOURTEENTH AMENDMENT—1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. . . .

The specific grounds are stated on pages 6 to 8 of the petition for certiorari, *supra*.

STATEMENT OF THE CASE.

1. Dramatis Personi.

(a) *Roger Touhy.*

Roger Touhy the petitioner lived with his wife and two children in one of the choice northwestern suburbs of Chicago. He had a considerable estate there. He was engaged in the business of supplying beer to taverns in those suburbs. (R. 27) His business was conducted on a decent level as was shown by the fact that neither he nor any of his men were ever arrested or charged with any offense. (R. 27) It was a peaceable business conducted in a peaceable and orderly manner. After the repeal of prohibition Touhy's business was carried on along strictly legal lines, the prescribed license fee being paid on every barrel of beer sold. (R. 28)

(b) *Al Capone.*

Al Capone aspired to be the vice lord of Chicago and to monopolize the sale of alcoholic beverages in Chicago and its suburbs. Capone naturally resented the competition of Touhy and tried to take Touhy's business away from him. (R. 28) Frequent references in the record to the "Syndicate" were generally understood as referring to Capone and associates. (R. 28)

(c) *John Factor.*

This man, known as "Jake the Barber", fraudulently secured seven and a half million dollars from British investors and before he fled from England sent a large portion of it to two banks in Chicago. (R. 23) His victims or some of them led by a British clergyman, (R. 84) organized to have Factor extradited to England and for that purpose employed counsel. (R. 3) A warrant of extradition was secured in 1932. (R. 25) Factor was taken into custody but a United States District Judge for the Northern District of Illinois ordered him released on the ground that the offense charged in the extradition proceedings as a crime in England, had not been made a crime in Illinois (R. 25); that decision was reversed by the Seventh Circuit Court of Appeals in *Factor* v. *Laubenheimer*, 61 F. (2d) 626. The Supreme Court heard the argument April 18, 1933, but the case was restored to the docket for re-argument April 29, 1933 and it was re-argued October 9, 1933. (R. 25) On December 4, 1933 (R. 25) this Court held the extradition proceedings valid, *Factor* v. *Laubenheimer*, 290 U.S. 276, (R. 25) and the mittimus was again served on Factor and he was taken into custody but released on habeas corpus by a U. S. Circuit Judge on June 27, 1934 on the ground that more than two months had elapsed since the extradition warrant was re-served

without its being put into effect. (R. 25) (See also statement of fact in *Factor* v. *Laubenheimer,* 290 U.S. 276, 286.) At one of the intervals at which he was at liberty but subject to re-arrest he claims to have been kidnapped by Roger Touhy (June 30, 1933), (R. 29) but the latter in his sworn statement denies any part in the kidnapping and declares his belief that Factor never was kidnapped. (R. 2) Capone and Factor maintained friendly relations. (R. 5 and 30) Both of them were hostile to Touhy. (R. 28)

John Factor is now serving a ten-year sentence in a federal penitentiary at Sandstone Minnesota upon his conviction in 1942 for mail fraud. He is not a citizen of the United States but is a citizen of Russia. (R. 8)

2. Certain Significant Dates.

Dates under this heading all appear in R. 25.

1932. British Consul applied for a warrant of extradition against Factor.

Jan. 12, 1932. Mittimus (Warrant) in the extradition proceeding served on Factor.

1932. Factor released on habeas corpus by U. S. District Judge.

1932. District Court reversed by Seventh Circuit Court.

April 18, 1933. Argument in U. S. Supreme Court.

April 29, 1933. Case ordered set for re-argument.

June 30, 1933. Factor supposedly "kidnapped". (R. 29)

October 9, 1933. Case re-argued in U. S. Supreme Court.

Dec. 4, 1933. U. S. Supreme Court affirmed the decision of the Seventh Circuit Court.

3. The Course of Litigation.

Touhy was indicted on November 8, 1933, by a grand jury of Cook County, Illinois, for kidnapping John Factor

for ransom. (R. 11) That was also the first day of the Hamm trial before a federal jury in St. Paul which resulted in Touhy's acquittal. (R. 6, 7) The actual kidnappers of Hamm confessed two years later and were sent to prison. (R. 6)

Touhy returned to Chicago after the Hamm trial waiving legal formalities, and stood trial in the Factor case. On the first trial the jury disagreed and was discharged over the protest of the defense at a time when they stood 10 to 2 or 8 to 4 for petitioner's acquittal. (R. 7) A second trial resulted in Touhy's conviction and sentence to imprisonment for 99 years. On appeal the Supreme Court of Illinois affirmed the conviction. (*People* v. *Touhy*, 361 Ill. 332).

John Factor, Isaac Costner and Walter Henrichsen were the only witnesses who testified on the trial to the identification of Touhy as one of the kidnappers. (R. 16) Of these three Costner, a "surprise" witness (name not furnished to the defendant's counsel in advance of the trial) was in Tennessee at the time of the supposed occurrences in Chicago to which he testified. (R. 62) Investigation after the trial resulted in the defense procuring affidavits from eleven disinterested persons who swore under oath that they had seen Costner in or near Newport, Tennessee, Costner's home, at the time of the kidnapping, thus positively disproving his whole testimony. (R. 62)

Touhy thereupon on February 15, 1938 sought his release by a petition for habeas corpus in the Supreme Court of Illinois. (R. 10) But that court, without opinion, on February 18, 1938 denied him leave to file the petition. This court denied certiorari. (*Touhy* v. *Ragen*, 303 U.S. 657).

4. The Error Coram Nobis case.

Thereafter in 1945 Touhy's attorney, Charles P. Megan, learned that Factor had confessed to Thomas C. McConnell, a prominent Chicago lawyer, that his eyes were bandaged during the "kidnapping" so that he could not see anyone but that on the trial he identified Touhy anyway. (R. 2-3, 68-70). This confession of perjury is the principal point in the present Petition for a Writ of Error Coram Nobis. The state has conceded that Factor's testimony at the trial was "indispensable" (R. 15) and Factor himself has considered that his testimony resulted in Touhy's conviction. (R. 14) This confession undermines the entire case on which the prosecution was based.

A word suffices to dispense with the third "identifying" witness, Walter Henrichsen, since his testimony was not properly in the record. Hendrichsen claimed or rather the State's Attorney claimed for him, a privilege against self-incrimination when being cross-examined by the defense. (R. 55-56) His testimony on direct examination should then have been stricken immediately. *State* v. *Perry,* 210 N.C. 796 (1936) 188 S.E. 639. (R. 56)

Henrichsen is now dead. (R. 54) Costner is in a federal penitentiary at Fort Leavenworth, Kansas, and Factor is in a federal penitentiary at Sandstone, Minnesota. (R. 9) These are the witnesses the State's Attorney relied on for Touhy's conviction. (R. 16)

Touhy's petition for a Writ of Error Coram Nobis seeking a new trial was filed in the Court of his conviction on August 10, 1946. That court sustained a plea that the error coram nobis action was barred by the time limitation in the statutory substitute for the common law writ. The court also sustained a demurrer to the petition. (R. 113) The Supreme Court of Illinois affirmed on both

points, holding that the newly discovered evidence of perjury by Factor was not a ground for relief through coram nobis proceedings and that the five-year limitation in the statute was a complete bar to the petition.

Your petitioner has not been afforded a hearing on the merits of his petition in spite of the strong case made on this record.

SPECIFICATION OF ERRORS TO BE URGED

The first and fundamental error to be urged, is that the Supreme Court of Illinois has denied all relief under Illinois law to which petitioner was entitled under both state and federal Constitutions, because of the discovery, long after final judgment, that in the trial of the kidnapping charge the perjured testimony of Factor, Costner and Henrichsen was introduced and the verdict of the jury rested on that false testimony.

A second error will be urged that the Supreme Court of Illinois has erred in holding that the statutory remedy given by the Illinois Practice Act (R. S. Ill. Chap. 110, Sec. 196) as a substitute for the common law Writ of Error Coram Nobis is barred by the fact that more than five years have passed since the date of the original judgment of conviction.

It will also be urged that because of that ruling petitioner has been deprived of all relief under Illinois law for his unlawful imprisonment and is therefore deprived of his liberty contrary to the Fourteenth Amendment to the Constitution.

And finally the question arises whether in view of the fact that the petitioner has exhausted all remedies under Illinois law this Court should grant certiorari, reverse the judgment of the Illinois Supreme Court in this the error coram nobis case and remand the case for a new trial.

SUMMARY OF THE ARGUMENT.

On the trial of a charge of kidnapping, perjured testimony was introduced by certain witnesses who undertook to identify Roger Touhy as one of the alleged kidnappers.

The perjury was not discovered until eleven years after the final judgment. The evidence so discovered was of such a character as completely to undermine the entire case on which the prosecution was based.

All other remedies for the illegal imprisonment having been exhausted petitioner applied to the Criminal Court of Cook County, Illinois, for relief obtainable by a writ of error coram nobis.

The Criminal Court of Cook County and the Supreme Court of Illinois held that proof of the discovery of the perjured evidence could not be considered in the coram nobis proceeding.

Both of those courts held that relief under the coram nobis act was barred by the lapse of five years since final judgment.

Both of those courts held that the allegations of the coram nobis petition and the statement contained in counsel's suggestions in support thereof consisted of statements of hearsay evidence and conclusions.

The petitioner having been unlawfully deprived of his liberty by imprisonment in the State penitentiary on a judgment based on perjured testimony, and the Illinois courts having denied him the relief he is entitled to under State law, this Court should grant him the protection vouchsafed by the Constitution of the United States by

granting him the writ of certiorari as prayed for in his petition.

Petitioner argues that the five year limitation in the Illinois error coram nobis act applies only to civil actions and not to criminal actions, that it has often been construed by the Illinois Court to refer to civil actions and not to criminal prosecutions.

That by its rulings the Supreme Court has denied to the petitioner Roger Touhy any relief under Illinois law for the illegal restraint of his liberty and that therefore the Federal courts have jurisdiction to give him that relief.

ARGUMENT.

MAY IT PLEASE THE COURT:

It was the contention of petitioner's former counsel, the late Charles P. Megan that while the ancient common law theory of error coram nobis was strict and narrow the modern view is more liberal and that the trend is toward affording a more prompt and direct remedy by way of the error coram nobis route. His exposition of that theory is in the record (R. 16) and is presented by his Suggestions in Support of the error coram nobis petition. We join in the view that delay in the administration of justice is to be deplored and express the hope that the court having before it such a complete statement of the deprivation of petitioner's rights, privileges and immunities under the Federal Constitution may speed the realization of his right to a new trial because the trial resulting in his conviction is vitiated by perjury.

Time Limitation on Error Coram Nobis.

The Supreme Court of Illinois has held that the right to relief under the error coram nobis statute has been barred by the limitation of the exercise of that right to five years after the conviction. That limitation is in the Civil Practice Act. (R. S. Ill. Chap. 110, Sec. 196.)

The section providing for the statutory substitute for a writ of error coram nobis was first adopted in 1871 (immediately after the present Illinois Constitution went into effect) in an act entitled "An act in regard to practice in courts of record" and it has since been re-adopted always as a part of the Civil Practice Act where it still

appears. The Constitution of Illinois provides (Article IV Sec. 13) that

> "No Act hereafter passed shall embrace more than one subject, and that shall be expressed in the title . . ."

The Illinois Supreme Court has heretofore consistently held that a provision governing civil procedure, cannot be included in an act governing criminal procedure unless so expressed in the title of the act.

People v. *Horan,* 293 Ill. 314 (1920) at pages 318, 319.

Campe v. *Cermak,* 330 Ill. 463 (1928) at page 468.

Vick v. *Commonwealth,* 236 Ky. 436 (1930) at p. 443, 33 S.W. 2d 29.

Nothwithstanding this provision of the Illinois Constitution and those cases the Supreme Court of Illinois holds that the Civil Practice Act can now be read to apply to criminal actions.

For the sake of brevity we select from Mr. Megan's citations and discussion in support of this position (R. 17-21) the following:

In *People* v. *Murphy,* 296 Ill. 532 (1921) at pages 533-535 the Supreme Court of Illinois said:

> A writ of error is a common law writ, the limitation of which was twenty years.
>
> The limitation sought to be availed of here is contained in section 117 of the Practice act. The title of that act is, "An Act in relation to practice and procedure in courts of record," and it applies to and controls the method of procedure in civil suits on the law side in trial courts, but it has been held to have no reference, in general, to proceedings in criminal cases in trial courts unless such cases are expressly mentioned (several Illinois cases given in illustration) . . . Except in cases where by express mention or necessary implication the provisions of the Practice

> act are made applicable to criminal . . . cases, the method of procedure in criminal cases is controlled by the Criminal Code, found in chapter 38 of the Revised Statutes . . . The plea that the writ was not sued out within three years, therefore, stated no defense to the writ . . . The judgment must be reversed and the cause remanded.

It seems inescapable therefore that the Act which limits error coram nobis proceedings in civil actions to five years from the date of final judgment can have no effect whatever on the twenty year limitation which applied to that remedy at common law and now applies to it in criminal cases.

See also *People* v. *Chapman,* 392 Ill. 168, (1946) at page 169; *State* v. *Hardesty,* 132 Md. 172, (1918) at pages 176, 177, 103 Atl. 461.

Untenable Objections to Petition and Suggestions.

The Supreme Court of Illinois also holds that the petition for relief by way of the error coram nobis route is barred because the allegations of the sworn petition are not supported by affidavits of others and are mere statements of conclusions and that the evidence therein set forth is hearsay evidence and not to be considered. It is submitted that a petition for a writ of error coram nobis is in its essence analogous to an offer to prove. It is a statement of what the petitioner will prove in regard to the discovery of the perjured testimony. The objection that it contains hearsay evidence overlooks the analogy which we are suggesting and the purpose and function of the petition.

It is also suggested by the Illinois Supreme Court that because the petition is not supported by the affidavits of either the lawyer to whom John Factor is alleged to have

stated that he committed perjury upon the trial of the kidnapping case or of Factor himself, those statements cannot be taken as true. The petition is sworn to by the petitioner himself. Those facts are also stated by his attorney in his suggestions in support of the error coram nobis petition. In court proceedings an attorney is an officer of the court acting in discharge of his duty to the client and to the court. His statement is of far greater dignity and weight than a mere affidavit. The sanctions for its falsity are more potent and more compelling, for false testimony in an affidavit requires indictment, trial by jury and long delay, whereas, the false statement of an officer of the court in the performance of his duty to the court, is punishable in summary fashion as a contempt of court, and by disbarment.*

The Development of Error Coram Nobis Law.

The petitioner's late counsel in his Suggestions in Support of the petition for writ of error coram nobis which is part of the record established the proposition that the discovery of perjured testimony after judgment is a proper basis for a new trial where the newly discovered evidence is of such a character as completely to undermine the

* Perhaps it is not amiss to suggest that in the Federal Rules of Civil Procedure attorneys for the parties are not required to file affidavits. Their certificates are made sufficient. (Rule 11, FRCP.) The relevant provisions of that rule are as follows: "Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated . . . Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit . . . The signature of an attorney constitutes a certificate by him . . . For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action . . ."

entire case on which the prosecution is based. (R. 15) (Citing *People* v. *Becker*, 210 N.Y. 274 (1914) at page 327, 104 N.E. 396 and *People ex rel.* v. *Ragen*, 129 Fed. 2d 811 (1942 C.C.A. 7th) at p. 813.)

The petitioner's late counsel also in his suggestions established the proposition that the discovery of perjured testimony after judgment is a proper basis of an application for a writ of error coram nobis (R. 16) and cited *Davis* v. *State*, 200 Ind. 88 (1928) 161 N.E. 375. The court in that case said at p. 106:

> And we do not undertake to lay down a general rule of law that a writ of error *coram nobis* should be granted whenever a material witness recants and admits perjury, but in the sound discretion of the court, where, as here, it appears that the verdict most probably would not have been rendered except for such testimony and that there is a strong probability of a miscarraige of justice unless the writ is granted, it should be granted.

The tendency of the courts in modern times is to award the writ of error coram nobis more generously than in the ancient days of the common law.

The writ of error coram nobis is a living and growing part of the remedial law of the land.

In *U. S.* v. *Steese*, 144 Fed. 2d 439 (C.C.A. 3, 1944) a forgery case, the court said at page 442:

> There is a further point stressed by counsel for the Government. It is that there is no way by which this case, thus sought to be reopened by motion many years after the term has expired in which the judgment of conviction was had, may be opened. Certain it is that the time for motion for a new trial or for an appeal has long since passed. *Habeas Corpus* is not available in this district as petitioner is not here confined. The Supreme Court has expressly refrained from passing upon the question whether district courts

may exercise in criminal cases a correctional jurisdiction at subsequent terms. *We think, however, a court is not helpless to remedy an injustice, if one is proved to have been committed, which goes to the extent of depriving a man of his constitutional rights.* The motion in the particular case may be treated, for this purpose, as a modern substitute for the ancient writ of error *coram nobis*. We think the present question involving protection of one's rights under the Constitution is just as fundamental as those for the protection of which this time-honored writ was devised and used in the early common law procedure.

In *Lyons* v. *Goldstein*, 290 N. Y. 19 (1943) 47 N. E. 2d 425, the court said at pp. 22 and 25:

> We are not concerned with the merits of the intervener's application. The only question which we consider or upon which we pass is whether the tribunal before which the application was made has power, under any circumstances, to hear and determine an application to reopen a judgment of conviction which is based upon fraud and misrepresentation after the judgment has been entered and sentence has been imposed and the defendant has commenced his term of imprisonment. * * *
>
> The inherent power of a court to set aside its judgment which was procured by fraud and misrepresentation cannot be doubted [citing two civil cases]. No logical distinction can be made between such power over judgments in civil cases and such power over judgments in criminal cases. There is nothing unique about a judgment or its execution in criminal cases which excepts it from the rules applicable to judgments generally and the inherent powers of the courts with reference to them. The power was exercised in criminal cases at common law through the writ of error *coram nobis* [citing two cases]. * * * It would be an extraordinary reversal of all precedent to deny to a competent tribunal power over its own judgments in either civil or criminal cases.

In matter of *Morhous* v. *New York Supreme Court*, 293 N.Y. 131 (1944) 56 N.E. 2d 79, Chief Judge Lehman said at p. 136:

> At common law a court of competent jurisdiction had power by writ of error *coram nobis* to set aside its own judgment where it appeared that the judgment complained of would not have been entered if the facts upon which the error is predicated had been presented in the trial court (citing *Robinson* v. *Johnson*, 118 F. 2d 998.) Analogous jurisdiction to set aside upon motion a judgment obtained by fraud and misrepresentation is undoubtedly inherent in the courts of general civil jurisdiction of this state. Question remained [up to 290 N. Y. 19] whether similar jurisdiction was limited or withheld by the Legislature from courts exercising criminal jurisdiction. In *Matter of Lyons* v. *Goldstein*, (*supra*), that question was authoritatively decided by a closely divided court. We held that a court of criminal jurisdiction has inherent power to set aside upon motion its own judgment based upon fraud or misrepresentation *of an officer of the State* depriving a defendant of due process, even though no such power is expressly conferred by the Code of Criminal Procedure; *and that limitations contained in the Code, relating to other motions affecting a judgment, do not apply in such case.* (cf. *Robinson* v. *Johnson, supra.*) It is hardly open to question that in accordance with the principles formulated in the opinion in *Matter of Lyons* v. *Goldstein* (*supra*), and authoritatively established by the decision in that case, a motion by the relator in the Court of General Sessions to vacate the judgment of conviction of that court would be an appropriate proceeding in which remedy for the alleged wrong could be obtained upon proof of the truth of the allegations of the petition.

This would be by motion in the nature of a writ of error *coram nobis.*

The development of the law with reference to the writ of error *coram nobis* is most strikingly shown by the developments in Kentucky. Originally the courts of Kentucky

denied the writ of error *coram nobis* in cases like the case at bar.

In a case where such rights were denied in the State Courts a writ of habeas corpus was sought in the federal court.

In a case from the sixth circuit, *Jones* v. *Kentucky*, 97 F. 2d 335 (1938), the Circuit Court of Appeals said (p. 338):

> Nor are constitutional safeguards maintained or respect for the judicial process promoted by convictions secured on perjured testimony. If the new evidence offered in the present case is to be given any credence * * * there is reason to believe that the conviction here assailed was so secured. This is not in criticism of the Attorney General, for its infirmity was not disclosed to him until after the conviction, though it might well have been discovered had reasonable opportunity for investigation been accorded the defendant and his counsel.
>
> The concept of due process as it has become crystallized in the public mind and by judicial pronouncement, is formulated in *Mooney* v. *Holohan*, 294 U.S. 103, 112. * * * If it be urged that the concept thus formulated but [that is, *only*] condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the delineated requirement of due process in the *Mooney* case embraces no more than the facts of that case require [the use by the prosecutor of testimony known to him to be perjured], and that "the fundamental conceptions of justice which lie at the base of our civil and political institutions" must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired.

The petitioner was accordingly discharged on *habeas corpus,* "without prejudice to the right of the commonwealth to take such other proceedings according to law as are consistent herewith." This points straight towards the *coram nobis* procedure.

Later the Kentucky state court again had presented to it, in another case, the question of granting the writ of error coram nobis. In this case it overruled its former decisions and followed the decision of the federal court. This case is *Anderson* v. *Buchanan,* 292 Ky. 810 (1943) 168 SW 2d 48.

Anderson was one of three men who were tried separately for the atrocious murder of Mrs. Miley and her daughter at the Lexington Country Club. Each was convicted and sentenced to death. All three appealed (separately) and their convictions were affirmed. Later, on the verge of his execution, Anderson filed a petition for a writ of error *coram nobis,* and for other remedies, setting up that he had been convicted on false and perjured testimony, the evidence of which was newly discovered by him. The Court of Appeals of Kentucky said (p. 813):

> Penney [one of the other two men convicted] was the principal witness against Anderson. * * * Whether other evidence would have been sufficient to convict him is problematical. In his deposition Penney retracts that testimony as it relates to Anderson and states that Anderson had nothing to do with the commission of the crime. * * * Penney further states that he is reconciled to his sentence of death, has given up hope of escaping it and wants to make a clean breast of the matter.

The court reviewed the history of the previous case of *Jones* v. *Commonwealth,* 269 Ky. 779 (1938), 108 S. W. 2d 816, in which the Court had declined to use the

procedure of the writ of error *coram nobis*, and later Kentucky cases. The court said (p. 817):

> These two later opinions indicate an appreciation of the fact that a situation has developed where one convicted of crime and sentenced to death has no remedy in the Courts of Kentucky after expiration of the term of the court at which he was tried even though he can establish his innocence beyond a shadow of a doubt and the prosecuting officers concede that he was convicted upon perjured testimony or that evidence has been newly discovered and he should be exonerated. This is an abhorrent situation. A defendant so placed ought not to have to resort to the courts of the United States to obtain relief. We have been forcefully impressed by the recent opinion of the Supreme Court of the United States expressing its duty to entertain a petition crudely drawn and filed by the defendant himself asking a review of an order of the Supreme Court of Kansas which denied his application for a writ of *habeas corpus*. * * * The petition was construed as sufficient to reveal *prima facie* that the petitioner had been convicted of murder and robbery upon perjured testimony and the suppression of favorable evidence by the prosecuting officers. The court declared that his rights under the due process clause of the Federal Constitution had apparently been denied him and remanded the case to the State court for further proceedings.
> * * *
>
> The arm of justice in Kentucky ought not to be any weaker or shorter than it is in the Federal courts. Our State Constitution also insures every person a "remedy by due course of law" for an injury done him in his person. Sec. 14. And we have already recognized that the writ of error *coram nobis* is a part of our "due course of law." As stated in *Hysler* v. *Florida*, 315 U. S. 411, 86 L. ed. 932:
>
> > This common law writ, in its local adaptation, is Florida's response to the requirements of *Mooney* v. *Holohan*, 294 U. S. 103, for the judicial correction of a wrong committed in the administration of criminal justice and resulting in the deprivation of life or liberty without due process.

The Supreme Court held that "Such a state procedure of course meets the requirements of the Due Process Clause." The situation and conflict of authority have therefore demanded a reconsideration of our decisions.

The court also said (p. 819):

> We recognize that it is a rule in several jurisdictions that a writ of error *coram nobis* will not lie on the ground of newly discovered evidence or alleged false testimony. The reasons assigned for the rule are that the defendant might discover or fabricate evidence which would have been material on the trial and require the courts to try the whole case over again, thereby rendering the validity and stability of judgments too uncertain to comport with sound policy, public convenience and safety * * * But in some of those jurisdictions the door has been left open * * * The rule seems to be one of expediency and loses sight of the power of the courts to protect themselves against imposition. It seems to write in an unwarranted exception and to overlook the real purpose of the writ, which is to revest the court with jurisdiction in an extreme emergency and permit inquiry into the important question of whether the judgment of conviction should be vacated because the defendant was unknowingly deprived of a defense which would have probably disproved his guilt and prevented his conviction, and if that probability be established to grant the defendant a new trial of the accusation.

The court also said (pp. 820-821):

> In the case at bar the trial court, following the decisions of this court, as we have stated, in effect sustained a demurrer to the petition. We think that was a proper ruling except as to that part which sought a writ of *coram nobis*. As we have also said, the conviction of the petitioner, Anderson, was largely upon the testimony of Penney. Baxter did not testify on Anderson's trial. It seems to us that the petition, with the transcript of their depositions, discloses *prima facie* that there may have been a miscarriage of justice; at least they present allegations of circumstances, substantially supported, which justify further judicial inquiry. Upon a trial of the issues the court

may conclude that the ends of justice do not require that the judgment of conviction be set aside and a new trial of the indictment ordered.

The decision of the Supreme Court of Illinois is contrary to the modern trend of the law. It in effect denies petitioner all relief in violation of his Constitutional rights.

Relief by habeas corpus will also be denied in Illinois under the Habeas Corpus Act of that state. (Ill. Rev. Stat. Ch. 65) The Supreme Court of Illinois will not entertain an original petition for such a writ as it has stated in *People ex rel. Swolley* v. *Ragen,* 390 Ill. 106, at page 107: "Any petition which raises questions of fact, only, will not be considered. This Court does not try questions of fact." There is serious doubt that the lower courts of the state will entertain petitions for habeas corpus where the Supreme Court of Illinois has already affirmed the conviction as is the case in the case at bar (*People* v. *Circuit Court,* 369 Ill. 438, at 440-441). The courts of Illinois have thus indicated that they are powerless to enforce the rights given by the Federal Constitution. This abdication of power by the state courts makes the federal courts the only courts where those rights under the Constitution of the United States can be protected.

Simplification of the Issue.

This record may seem to embrace too broad a field, but the necessity of showing that the petitioner had exhausted all his remedies under state law made it necessary to present a full record on that point. The field is broad but the relief sought is very simple. Roger Touhy was convicted on perjured testimony and thus unlawfully deprived of a fair trial and of his liberty. He therefore seeks a new trial. We are not here seeking a review of any other judgment than the judgment entered in this error coram nobis proceeding. By that proceeding we ask for a new

trial in the original proceeding as to which error coram nobis is alleged.

Proof of the perjured testimony is supported not only by the confession and the testimony of witnesses but it is supported also by the inherent probabilities of the case appearing from facts and circumstances as to which there can be no dispute.

One of the first significant circumstances is the growth of hostility on the part of Al Capone toward Touhy, and Factor's affiliation with Capone, and Factor's joinder in that hostility (See Opinion in *People* v. *Touhy,* 361 Ill. 332 at p. 346).*

Factor contributes a new element to that hostility. He himself is a fugitive from justice. In 1932 he found himself faced with extradition proceedings. (R. 25) His first escape was through the holding of a United States District Judge that the crime in England for which extradition was sought had not been made a crime in Illinois. (R. 26) That decision set him at liberty for the time being. An appeal was taken and the Circuit Court of Appeals reversed the decision. Certiorari was allowed and the case argued on April 18, 1933. On April 29, 1933 this Court set the case for re-argument. It was reargued October 9, 1933. (R. 25) It had been made clear to him that a warrant of extradition could be kept alive only 60 days. (R. 24-25) He must find some way of maintaining his freedom from arrest until the expiration of the 60 day period. In June 1933 he saw the day of reckoning approaching. On June 30, 1933, the alleged "kidnapping" proceeding was planned by someone. Factor had the strongest motive for plan-

* In the opinion Mr. Justice Jones reciting facts presented in that case says "That a gang war existed in Cook County and the syndicate endeavored to exterminate Touhy and his associates by assassination."

ning that "kidnapping" as a rescue from extradition. Factor's confession and the affidavits of witnesses are strong proof that his testimony and that of his accomplices was false.

If the testimony was false, we urge with deference that technical rules of evidence should not be set up to deprive Touhy of his right to a new trial.

In cases which deal with the effect of the introduction of perjured testimony and declare it to invalidate the judgment, one frequently finds the words "especially when the prosecuting officer knows or was in a position to have known its falsity". The word "especially" is significant and important. If that word had not there been used the statement would mean that proof of knowledge or means of knowledge is necessary to the invalidating effect of perjured testimony. The use of the word "especially" negatives that construction and defeats any such argument. It is the wilful falsity of the statement which deprives the accused of his constitutional right to a fair trial.

The Controlling Case.

We now come to a brief discussion of the case which is here controlling, *Woods* v. *Nierstheimer*, 328 U.S. 211, 214. In that case the Supreme Court speaking by Mr. Justice Black at page 214, says:

> "According to the state, the denials of petitioner's applications rested on the separate and distinct ground that in the Illinois state courts habeas corpus is not the proper remedy for relief from judgments violating due process of law in the manner here alleged. The contention is that the exclusive relief against such judgments is provided by a statutory substitute for the common law writ of error coram nobis, c. 110, par. 196, Illinois Revised Statutes, 1945. The petitioner counters by calling attention to the fact that the statutory remedy is not available unless brought

within five years after the rendition of a judgment; that the judgment and sentence against petitioner was rendered more than five years ago; that consequently, if petitioner has no remedy for habeas corpus, he has no remedy at all; that we should not assume that Illinois grants no relief to one whose imprisonment violates rights protected by the United States Constitution, cf. *Smith* v. *O'Grady*, 312 U.S. 329, 85 L. ed. 859, 61 S Ct 572, and that we should therefore hold that habeas corpus is available to the petitioner. From our investigation of the law of the State of Illinois we conclude that the denials of the applications in this case could have rested, and probably did rest, on the ground that habeas corpus is not the proper remedy in cases such as the one before us. For this reason we are without power to review the judgments, see *Williams* v. *Kaiser*, 323 U.S. 471, 477, 89 L. ed. 398, 403, 65 S Ct 363, and the writs of certiorari must be dismissed. . . . "

The court also said at pp. 216-217:

"But we do not know whether the State Court will construe the statute so as to deprive petitioner of his right to challenge a judgment rendered in violation of Constitutional guarantees, where his action is brought more than five years after rendition of the judgment. Nor can we at this time pass upon the suggestion that the Illinois statute so construed would itself violate due process of law in that a denial of that remedy, together with a denial of the writ of habeas corpus, would, taken together, amount to a complete deprivation of a state remedy where Constitutional rights have been denied. We could reach that question only after a denial of the statutory substitute for the writ of error *coram nobis* based on the statute of limitations had been affirmed by the Supreme Court of the state."

The Supreme Court of Illinois has now so decided and this court has now reached that question. The Court then concludes at p. 217:

"Furthermore it cannot be doubted that if the State of Illinois should at all times deny all remedies to

> individuals imprisoned within the state in violation of the Constitution of the United States, the federal courts would be available to provide a remedy to correct such wrong. Ex parte *Hawk*, 321 U.S. 114, 88 L. ed. 572, 64 S. Ct. 448."

Here the petitioner Roger Touhy stands exactly where the Court has said one must stand in order that his rights under the Federal Constitution may be enforced by a federal court. He is remedyless in Illinois because of the decisions of the Courts below in this error *coram nobis* proceeding.

Petitioner's allegations in his petition and the statements of his counsel in suggestions in support thereof have not been denied. Judgment has been entered against him without hearing as to the truth of the allegations of perjured testimony. Those allegations must therefore be taken as admitted. Under the doctrine announced in the above quotations from the *Woods* case it seems that all the requirements of that case have been met.

We therefore respectfully submit that this Court should grant the writ of certiorari here prayed for and reverse the judgment of the Supreme Court of Illinois and remand the case for a new trial.

EDGAR B. TOLMAN,
THOMAS I. MEGAN,
HOWARD B. BRYANT,
30 North La Salle St.,
Chicago, Illinois,
Attorneys for Petitioner.

August 15, 1947.

n d i .
e s . e s . e n . n e . d e d

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947

No. 278

ROGER TOUHY,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

EDGAR B. TOLMAN,
THOMAS I. MEGAN,
HOWARD B. BRYANT,
Attorneys for Petitioner.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0563

SUBJECT INDEX.

Brief.

Cases Cited.

Statutes.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947

No. 278

ROGER TOUHY,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I.

NO FACTUAL CONTROVERSY.

The opposing brief for the Illinois Attorney General raises no controversy as to questions of fact. With commendable frankness he indicates in the first paragraph of his brief his substantial acceptance of our allegations of fact. He refuses to re-state the facts and states his purpose to be "merely to state in summary fashion those facts that fairly delineate the questions that petitioner seeks to present in this court."

II.

CONTROVERSIES AS TO THE LAW.

The opposing brief points out no particular in which petitioner has failed to exhaust every remedy available to him under Illinois law. Indeed, counsel for Illinois say (p. 2, par. 3) "Illinois concedes that under her mode of judicature, *habeas corpus* is not an appropriate means of asserting matter *dehors* the record of original conviction unless such matter was known to the trial court at the time that sentence was imposed. Therefore Illinois draws no conclusion adverse to petitioner from the fact that he has been denied a hearing upon *habeas corpus* in Illinois." They do, however, present many controversies as to the law of this case. Some of these controversies are in definite form. Others are merely implied by the form of statement.

In the first paragraph on page 3 of the brief in opposition counsel for Illinois imply an error on the part of petitioner's former counsel, in that, this action had been brought by filing a petition and not by a mere motion.

Counsel for Illinois seem not to appreciate the reason for resorting to the method of procedure at common law.

The choice of the older form of procedure was not inadvertent. It was deliberate. It was in harmony with the contention of petitioner's former counsel that the statute abolishing the old and substituting a new form of procedure for the old writ of error *coram nobis* was applicable only to civil actions and not to criminal cases. Without repetition the court is referred to what has been said on that subject in Mr. Megan's suggestions in support of the petition for writ of error *coram nobis*. (R. pp. 17-19)

III.

JURISDICTION.

In the argument of counsel for Illinois at page 9 of their brief in opposition the point is raised that the Illinois Supreme Court decision rests upon adequate non-federal grounds and that therefore this court lacks jurisdiction to review.

That point would have required consideration if this case were now before the court only on non-federal grounds. The error *coram nobis* proceeding rests upon Federal grounds namely, that the verdict of the jury and the judgment of the Illinois courts was vitiated by the admission of perjured testimony in violation of petitioner's right under the Constitution of the United States. The Supreme Court of Illinois in affirming the judgment of the Criminal Court of Cook County on the ground that the introduction of perjured testimony is not permissible in an error *coram nobis* case under the law of Illinois, has denied the petitioner relief for his unlawful imprisonment in violation of the Federal Constitution. That ground is certainly a Federal ground of decision. Since all state remedies have been exhausted and no remedy under state law remains, this court has jurisdiction to enforce the Federal rights which Illinois has refused to recognize.

IV.

ALLEGED LACK OF VERIFICATION.

Counsel for Illinois claim that the petition in the *coram nobis* case is highly argumentative and urges its rejection because not supported by affidavits other than that of petitioner. No reason is given why the

verification of that petition by the petitioner himself is not a sufficient verification for the purposes of this proceeding.

It is important here to remember that a demurrer was filed to the petition and that the demurrer was sustained in the Criminal Court and that the action of the Criminal Court was affirmed by the Supreme Court of Illinois. A demurrer admits all allegations of fact well pleaded. The application of this ancient rule is not to be brushed aside by so vague an assertion as that the petition is "highly argumentative."

It is also urged that no excuse is given for not furnishing the affidavit of Mr. McConnell to Factor's confession. Can it be seriously urged that when a verified petition has been demurred to, and the demurrer sustained, and the proceeding dismissed, there is any burden on petitioner to explain the absence of other proof of the truth of the petitioner's averments? Why should it be necessary to give additional support to a petition admitted by demurrer? However, Mr. Charles P. Megan in his "Suggestions" in support of the petition for writ of error *coram nobis* pointed out the natural reluctance of an attorney voluntarily to disclose matters stated by Factor to him when Factor was conferring with him as one seeking to employ him as his lawyer. Service of a subpoena on McConnell would have been a futile act. It would have had no compelling force until the action came on for hearing. The state by filing its demurrer and the courts of Illinois by sustaining the demurrer made impossible a trial on any question of fact.

Opposing counsel also contend that "highly argumentative" statements are not entitled to be considered as supported by the statements in Mr. Charles P. Megan's "Suggestions" in support of the petition in the *coram*

nobis proceeding. We have already pointed out that a member of the bar, as an officer of the court, is amenable to more severe sanctions for what he says as an officer of the court than he would be for statements verified by his affidavit. (Petitioner's Brief pp. 31-32).

The Illinois Supreme Court also said that the allegations of the petition for writ of error *coram nobis* were "hearsay" statements of the highest degree. Those allegations in the petition were supported by Mr. Charles P. Megan's "Suggestions." On page 31, par. 3 of our original brief in this proceeding, we also answered the "hearsay" fallacy and point to the analogy of an "offer to prove". The allegations of any pleading setting up what a witness will say on the trial necessarily partake of the character of hearsay evidence. A pleading which states what will be said on the trial by witnesses, and counsel's offer to prove what witnesses will say on the trial, have never before been held to be objectionable as "hearsay".

V.

AN UNTENABLE TECHNICALITY.

Counsel for Illinois contend that "the entire Illinois Supreme Court record is not before this court", and that since the error *coram nobis* proceedings are part of the original proceedings on which petitioner was convicted, this court cannot review any part of the record. This seems to be an unreasonable attitude based on highly artificial reasoning. This proceeding involved the newly discovered evidence of Factor's perjured testimony and its vitiating effect upon the verdict. Counsel points out no particular of what they consider to have been omitted portions of the original case which would be applicable

to the narrow issue here presented. The statute referred to by counsel for Illinois, abolishing the writ of error *coram nobis* does not declare that the motion must be made in the original proceeding. It only requires that the motion be made in "the court in which the error was committed." (Illinois Civil Practice Act, Sec. 72, R. S. Ill. Chap. 110, Sec. 196. Our petition and brief foot-note p. 8.) The Supreme Court of Illinois in the opinion rendered on the appeal of the error *coram nobis* case said that the "motion or petition is the filing of a new action." (*People* v. *Touhy*, 397 Ill. 19, 25, Petitioner's Brief p. 16.)

VI.

OFFICIAL COMPLICITY.

Opposing counsel contend that even if one is convicted upon perjured testimony, he has no remedy unless there was "official complicity in the subornation or presentation of the perjury". The decisions of this court and those cited in the opposing brief do not support that broad statement. How can it be contended that one who has been imprisoned in consequence of perjured testimony has no remedy unless the prosecuting officers suborned the perjury, or participated in its introduction with knowledge of its falsity? The perjury is the real wrong. It influences the verdict just as much whether the prosecuting authorities knew of its falsity or believed it to be true.

That unjustified assumption of opposing counsel probably arises from the fact that in some of the cases dealing with the effect of the introduction of perjured testimony it was remarked that the perjury impeached the verdict "particularly where the prosecuting officers knew or ought to have known that it was false." This point was fully

dealt with in *Jones* v. *Kentucky*, 97 F. 2d 335, 338 (1938) cited and quoted from at length in our original brief at page 36.

Without retiring from the position just taken perhaps the Court should be reminded that the petition recites that the representatives of the State charged with the prosecution of the petitioner caused or allowed the perjured testimony to be introduced in evidence on the trial knowing or with reasonable means of knowing that the testimony was false. (R. 11) How could any public prosecutor fail to know that the testimony of Factor, Prince of Swindlers, was unworthy of belief?

VII.

OPPOSING COUNSEL'S CITATIONS.

Because *Woods* v. *Nierstheimer*, 328 U. S. 211, is so completely controlling in the instant case, and because *Jones* v. *Kentucky, supra,* so completely supports the proposition that official complicity is not an essential where perjury vitiates the verdict, we will not burden this Court with a review of each of the many cases cited by counsel for Illinois. None of them parallel this case and all of them are believed to be distinguishable. We may however be permitted to illustrate by pointing to *Lisenba* v. *California*, 314 U. S. 219. That case rested on conflicting evidence as to a confession by the defendant. It lacked any admission of facts by demurrer or otherwise. Mention might also be made of the fact that in *Sunal* v. *Large*, 91 Adv. Ops. 1555 (No. 535 October Term, 1946) this Court merely held that habeas corpus could not be substituted for an appeal after the time for appeal had passed. It was not an error *coram nobis* proceeding and did not involve perjured testimony discovered after the time for appeal had passed.

VIII.

EXHAUSTION OF REMEDIES UNDER ILLINOIS LAW.

The first of the series of proceedings resorted to by petitioner was an appeal to the State Supreme Court from the original judgment of conviction. That appeal was unavailing and any remedy for petitioner's unlawful imprisonment available by that appeal has been exhausted.

In 1938 petitioner sought relief from imprisonment by petition for habeas corpus in the Supreme Court of Illinois. That Court denied relief without opinion. Petitioner applied to the Supreme Court of the United States for writ of *certiorari* to review that decision but this Court denied the petition for *certiorari.* Illinois therefore provides no remedy by habeas corpus. Counsel for the State of Illinois concede that point. (Brief in Opposition, p. 2, par. 3) See also the Brief in Support of Petition for *Certiorari* in the instant case, p. 40, 2nd paragraph.

Upon the discovery, in 1945, that Factor had admitted that his testimony identifying Touhy was false, petitioner filed application for writ of error *coram nobis* in the court of his conviction. On demurrer by the state and a plea of the statute of limitations the Criminal Court of Cook County, Illinois denied him relief and the Supreme Court of Illinois affirmed the judgment of the Criminal Court, holding that there was no remedy under Illinois law by *coram nobis* proceedings.

Every remedy therefore has been denied petitioner by the Illinois courts, and, having exhausted all state remedies, this petition for *certiorari* brings to this Court the undisputed proof of conviction by perjured testimony and asks for a new trial and a fair trial and the protection of

petitioner's rights under the Constitution of the United States.

We close this reply to the State's Brief in Opposition with a mere reference to the *Nierstheimer* case (see Petitioner's Brief, pp. 42-44). Here petitioner Touhy has done each of the various acts which this Court in the *Nierstheimer* case declared to be essential as a prerequisite to relief in the Federal courts for unlawful imprisonment. It was there said that petitioner Woods was not entitled to the intervention of a Federal court because he had not resorted to the remedy by error *coram nobis* proceedings in the state court. It was further declared that this Court could not then assume that the Supreme Court of Illinois would deny relief because of the statutory limitation of five years for such proceedings. The petitioner in the instant case presents a record showing that the Supreme Court of Illinois has decided the very question in the very same way which this court in the *Nierstheimer* case said it could not assume the Illinois Court would decide. Having therefore demonstrated that the petitioner has been deprived of his liberty by perjured testimony of such a character as to completely undermine the verdict, and having demonstrated also that the courts of Illinois have so interpreted Illinois law as to deprive him of any remedy in its courts, the petitioner submits his case to this Court for the vindication of his rights under the Constitution of the United States.

Respectfully submitted,

EDGAR B. TOLMAN,
THOMAS I. MEGAN,
HOWARD B. BRYANT,
30 North La Salle St., Chicago, Illinois
Attorneys for Petitioner.

October 3, 1947

INDEX.

CASES CITED.

STATUTES, CONSTITUTION, CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 278

ROGER TOUHY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petition for *certiorari* states and discusses the full substance of petitioner's claims insofar as they are founded upon his assertion of alleged matters of fact. This Statement does not duplicate that presentation. It is intended merely to state in summary fashion those facts that fairly delineate the questions that petitioner seeks to present to this court.

In 1934 petitioner Touhy and seven other men (Stevens, Kator, Banghart, McFadden, Sharkey and Connors) were

convicted by a jury in the criminal court of Cook County, Illinois, of kidnapping John Factor for ransom. Petitioner's term of imprisonment, which was fixed by the jury under the applicable Illinois statutes,[1] was 99 years. (A previous jury had disagreed and had been discharged.)

The Supreme Court of Illinois affirmed upon a record that contained a bill of exceptions setting forth all of the evidence at the trial. The opinion of affirmance is reported as *People* v. *Touhy*, 361 Ill. 332, and, not having been printed by petitioner, is reprinted in full as Appendix I to this brief, *post*, pp. 20-38.

Petitioner, who contended at his trial and has since maintained that he was the victim of a "frameup" engineered by Factor in order to avoid extradition to England on charges of fraudulently obtaining large sums of money from British investors, has made several efforts to assert his charges of such "frameup" by petitions for *habeas corpus* in the State and Federal courts.

Illinois concedes that under her mode of judicature, *habeas corpus* is not an appropriate means of asserting matter *dehors* the record of original conviction unless such matter was known to the trial court at the time that sentence was imposed. Therefore Illinois draws no conclusion adverse to petitioner from the fact that he has been denied a hearing upon *habeas corpus* in Illinois.[2]

---

[1] Cahill's Revised Statutes, 1933, Ch. 38, par. 379.

[2] The point is not material in the instant case but in order to keep Illinois' position clear and constant in this court with respect to the avalanche of prisoners' charges of illegal extra-judicial elements in obtaining their convictions, we state that *habeas corpus* would be appropriate in Illinois if matter not appearing of record *but known to the trial court at the time of the imposition of sentence* resulted in a denial of due process, even though the record might be "fair upon its face". See *U. S. ex rel. Tony Marino* v. *Ragen*, No. 1382, October Term, 1946, pending before this court at the time that this brief is written, in which it appeared that petitioner, *with the knowledge of the trial court*, pleaded guilty to murder and waived counsel when petitioner could speak only a foreign language and the only interpreter afforded was the officer who had taken his confession. In this case Illinois' Attorney General, conceding the propriety of *habeas corpus* in a State circuit court, has confessed error and has consented to the discharge of petitioner.

In December of 1946, a little over twelve years after petitioner and his co-defendants had been convicted of and sentenced for the kidnapping, petitioner filed the instant "petition for writ of error *coram nobis*" in the criminal court of Cook County. The Illinois Supreme Court, adhering to its holding that the common law writ had been superseded by a statutory motion in lieu thereof, treated the petition as such a motion.[3]

The contents of the petition for writ of error *coram nobis*, besides appearing in full in the transcript (Tr. pp. 2 through 94), are set forth in essential substance in the petition and brief for *certiorari* in this court. We do not reproduce those contents. But the following summary statement is sufficient fairly and clearly to pose the constitutional questions sought to be presented here:

The petition, which is highly argumentative and contains a brief under the style of "Suggestions", reiterates petitioner's claim that he is innocent of the kidnapping, repeats petitioner's claim that Factor, in order to escape extradition to England, probably "kidnapped himself" and that he laid the blame for his kidnapping, real or imaginary, upon petitioner and his co-defendants because petitioner had been charged with the kidnapping of a man named Hamm in the Minnesota twin cities and because petitioner's and his co-defendants' reputations were more vulnerable to a charge of kidnapping than would have been the reputations of citizens who had not faced similar charges before.

---

[3] "The writ of error *coram nobis* is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, *non compos mentis* or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years." (Ill. Rev. Stats. 1945, Ch. 110, par. 196.)

The petition for writ of error *coram nobis* in the criminal court says that in October, 1934, "Factor told Thomas C. McConnell, a Chicago lawyer, that he (Factor) had not been able to see anyone during the holding for ransom, on account of a bandage over his eyes, but that he swore to the identification of Touhy anyway." The petition further says that "petitioner learned of Factor's confession for the first time within the past few months" when his counsel "informed him that he learned of it for the first time in October, 1945, but counsel did not communicate this to the petitioner until some time later. These facts," the petition says, "have never before been disclosed to any court" (Tr. pp. 2-3).

The petition was not supported by any affidavit from McConnell or from anyone else except petitioner; nor does it excuse or explain the failure to produce that affidavit. (Tr. p. 77; Pet. p. 3.) Petitioner does not even supply the affidavit of the counsel who claims to have heard McConnell's statement that Factor recanted. Neither the petitioner nor any affidavit from his counsel suggest why McConnell should have withheld this statement, vital if true, from a time only shortly after petitioner's first trial until a few months ago, or for a period of twelve years.

The petition also recanvasses, in detail not reproduced in this statement, petitioner's contentions that the evidence at the original trial was not demonstrative of his guilt if indeed it was not wholly flimsy and insubstantial, asserts petitioner's innocence and invokes Illinois' constitutional provisions and the Fourteenth Amendment to the Constitution of the United States.

The State filed a demurrer to the petition and a plea of the five-year statute of limitations embodied in the *coram nobis* provisions of the Practice Act. The trial court ren-

dered a written opinion (Tr. 111-113) sustaining the demurrer under the plea of the statute of limitations and entered a judgment in accordance with the opinion (Tr. 113).

The Substance of the Illinois Supreme Court's Opinion and the Bases of its Decision.

The Illinois Supreme Court affirmed the trial court's judgment in a unanimous opinion delivered by Mr. Justice Wilson, reported as *People* v. *Touhy*, 397 Ill. 19, and reprinted as an appendix to the petition for *certiorari* appearing at pages 11-19 as well as in the transcript at pages 115-122. In this brief all page references to this opinion will be keyed to the opinion as printed by way of appendix to the petition for *certiorari* here.

As we have noted above, the Illinois Supreme Court, although recognizing that "petitioner captions his pleading a 'Petition for Writ of Error *Coram Nobis*,'" treated it "as a motion in the nature of a writ of error *coram nobis*" (Appx. to Ptn., p. 13). The court affirmed the trial court on three separate and distinct grounds:

1. The Supreme Court held that the petition was insufficient under Illinois' canons of *coram nobis* procedure because it was not supported by any affidavits other than the petitioner's formal verification and jurat. The court said (Appx. to Ptn., p. 18):

> "The petition is not supported by affidavits of either the lawyer to whom John Factor is alleged to have stated that he committed perjury upon the trial in the kidnapping case, or of Factor himself. The allegations, so far as the alleged false testimony of Factor is concerned, are hearsay statements of the highest degree. We do not regard the allegations in the petition as having been taken as true, even for the purpose of disposing of the demurrer."

2. The court held that *coram nobis* is not available to correct judgments in criminal cases merely because they rest upon perjured testimony unless due process is denied by official complicity in the subornation or presentation of the perjury. The court said (Appx. to Ptn., p. 19):

> "Irrespective of whether the allegations of the petition be taken as true for the sole purpose of disposing of the demurrer, the contention is not well taken that the common-law writ of error *coram nobis,* or its statutory substitute in this State, is available as a remedy for newly discovered evidence or for alleged perjured testimony. We have this day, in *People* v. *Gleitsman,* No. 29957 [396 Ill. 499], reaffirmed this court's adherence to the rule that writ of error *coram nobis* does not lie to correct false testimony, nor for newly discovered evidence." (Cf. *City of Chicago* v. *Nodek,* 202 Ill. 257, holding that where counsel for the City was implicated in the subornation of perjury, *coram nobis* was appropriate.)

3. The court also held that the petition was barred by the five-year statute of limitations provision embodied in the *coram nobis* provisions of the Practice Act since no duress, official interception of attempts to communicate with courts, or other official presentation of filing within the five-year period was shown. (Cf. *People* v. *Green,* 355 Ill. 468, holding, in accordance with this court's declarations, that where a prisoner's attempts to gain access to the courts within the period of limitations are intercepted by prison officials, the statute of limitations is tolled.)

Petitioner filed a petition for rehearing, which was denied (Tr. pp. 123-129).

The Entire Illinois Supreme Court Record Is Not Before This Court.

In Illinois, *coram nobis* proceedings, whether in civil or criminal cases, are a part of the continuing record of the original suit, action or proceeding in which they are filed. (The *coram nobis* provisions cited and quoted in full *ante*, p. 3.) Therefore a complete record of the case of *People* v. *Touhy*, Criminal Court No. 71236, would be comprised of the Supreme Court's record upon the original writ of error (*People* v. *Touhy*, 361 Ill. 332, First Case), as well as the transcript of the record in the instant proceeding.

Moreover it appears that, although the Supreme Court was not bound to do so under its practice, it did in fact take cognizance of petitioner's original application for *habeas corpus* in that court. The court's reference to the original petition for writ of *habeas corpus* appears at page 13 of the appendix to petition for *certiorari* and is reprinted in the margin.[4]

Therefore petitioner has not brought to this court the full substance of the matters of record that were before the Illinois Supreme Court and cognizable by it in this proceeding.

---

[4] "An examination of the petition for *habeas corpus* filed in this court, more than eight years before instituting the present action, discloses that Touhy alleged Factor's testimony in the trial upon the indictment for kidnapping was false, and also, that Costner committed perjury upon the trial. He averred that knowledge of the facts alleged first came to him immediately preceding February 14, 1938. The petition for *habeas corpus* was supported by eleven affidavits. The present petition for a writ of error *coram nobis* is not supported by a single affidavit."

The Questions Presented.

The record presents the following questions:

1. Does the Illinois Supreme Court's holding that the petition was properly dismissed because it was not supported by affidavits of the witnesses whom it named, the absence of such affidavits being neither explained nor excused, constitute an "adequate non-federal ground of decision" requiring dismissal of this petition?

2. May this court properly entertain this cause in the absence of that part of the record that was made prior to the affirmance of the original conviction?

The following questions do not arise if, as we contend, the Illinois Supreme Court's decision rests upon the adequate non-federal ground that the unexplained absence of supporting affidavits justified, under Illinois procedure, a denial of the petition or if this court holds, as we say that it should, that it does not have before it a sufficient record to decide the questions presented.

But if this court could say that there is no adequate non-federal basis of decision, grounded in Illinois procedure, and if this court could consider this case upon the present fragmentary record, then the following questions would arise:

3. Did the Illinois Supreme Court deny federal due process by holding that a conviction obtained by perjury is not tainted with lack of due process unless there be complicity upon the part of State officials in suborning or presenting the perjured testimony?

4. If petitioner's application for relief in the nature of *coram nobis* had otherwise been appropriate, did the Illinois Supreme Court err in holding that Illinois may validly limit the time for the assertion of petitioner's claims by a five-year statute of limitations?

ARGUMENT.

I.

The Illinois Supreme Court's decision rests upon adequate non-federal grounds and upon a view of matters of record in that court that are not before this court. Therefore this court lacks jurisdiction to review.

A.

This court lacks jurisdiction where the Illinois Court's decision rests upon an adequate non-federal ground.

Where a state court's denial of a hearing upon a prisoner's charges that he is confined without due process rests upon a ground of state procedure that is not *per se* federally unconstitutional, this court lacks jurisdiction to review on *certiorari* the state court's decision. (*White* v. *Ragen*, 324 U. S. 760, decided together with *Lutz* v. *Ragen*, id.)

B.

The petition for writ of error coram nobis was insufficient under Illinois' modes of procedure and upon a view of the entire record.

The Illinois Supreme Court, having before it the complete record of petitioner's original conviction (affirmed, *People* v. *Touhy*, 361 Ill. 332, reprinted in full, *Appendix to this Brief, post*) and likewise having before it his *habeas corpus* proceeding in that court, declared in language quoted in the Statement of the Case, *ante*, that the petition for *coram nobis* was properly denied because it was not supported by affidavits of the witnesses, including the witness

McConnell, whom it mentioned as ready to testify upon a hearing if one should be granted.

This is certainly not an unconstitutional requirement to lay upon a prisoner who, twelve years after his conviction of a very serious offense, seeks to reopen his case upon the basis of a recanting statement allegedly made more than twelve years before it is sought to be used.

This court's decision most nearly in point in this connection is *Hysler* v. *Florida*, 315 U. S. 411, cited by petitioner, (Ptnr's. Brief, p. 38). [The *Hysler* case is also authoritative upon other aspects of this case and is considered *post* in other connections.] In that case one Hysler had been convicted of murder and sentenced to death. After his conviction and sentence had been affirmed by the Supreme Court of Florida (132 Fla. 209), Hysler "petitioned the Supreme Court of Florida for permission to apply to the Circuit Court of Duval County, Florida (the court before which he was originally tried) for writ of *coram nobis*" (p. 415).

"Hysler's claim before the Supreme Court of Florida" this court said through Mr. Justice Frankfurter, "was that Baker repudiated his testimony insofar as it implicated Hysler and that he now named another man as the instigator of the crime. Considering the fact that this repudiation came four years after leaden-footed justice had reached the end of the familiar trail of dilatory procedure, and that Baker now pointed to an instigator who was dead, the Supreme Court of Florida had every right and the plain duty to scrutinize this repudiation with a critical eye, in the light of its familiarity with the facts of this crime as they had been adduced in three trials, the voluminous records of which had been before that Court." (p. 417.)

In a note to the margin at this point, this court said:

> "In denying Hysler's application, the Supreme Court of Florida specifically stated that it was taking judicial cognizance of its own records. 146 Fla. 593, 594-95, 1 So. 2d 628."

The principal particulars in which the *Hysler* case differs from the instant case militate against, not in favor of, petitioner in this case. In the *Hysler* case there was a specific charge that "third degree" methods had been applied to the witnesses upon whom Hysler's conviction in part depended. No such charge is made in the instant case.

This court held that even if Hysler's petition were to be read as importing a charge of denial of due process because of official complicity in the "framing" of Hysler, the Florida Court was justified in considering what this court called the "substantiality" of Hysler's claim in point of its probability "on the basis of all that was before it, namely, the petition and its accompanying affidavits" (there are no "accompanying affidavits" in the instant case except petitioner's verification of matters which he says are not within his personal knowledge) *"and the records of the prior cases arising out of the same crime."*

This court continues at page 421:

> "• • • The Court had to judge the substantiality of this claim on the basis of all that was before it, namely, the petition with its accompanying affidavits and the records of prior cases arising out of the same crime. The Court concluded that Hysler's proof did not make out a *prima facie* case for asking the trial court to reconsider its judgment of conviction. However ineptly the Florida Supreme Court may have formulated the grounds for denying the application, its action leaves no room for doubt that the Court deemed the petitioner's claim without substantial foundation. • • •"

The Illinois Supreme Court's opinion affirming petitioner's and his co-defendants' confession, not supplied by petitioner but reprinted in an appendix to this brief, plainly discloses that petitioner's conviction by no means rested upon the testimony of Factor alone. Co-defendants implicated him in the kidnapping. Touhy does indeed claim that these co-defendants were perjurers and were motivated by a desire to receive consideration. But this claim was thoroughly litigated at the time of the petitioner's original trial. This court denied *certiorari.*

Petitioner sought to reopen this case solely upon his personal and entirely unsupported assertion that a lawyer heard Factor recant his testimony in 1934, kept the fact of this recantation, vital if true, secret from petitioner, for about eleven or twelve years, and then divulged it. The lawyer's affidavit is not attached to the petition; nor is its absence excused, explained or in any way accounted for.

The Supreme Court of Illinois, in accordance with this court's holding in the *Hysler* case, 315 U. S. 411, read petitioner's application in the light of the record of petitioner's original conviction, which was a part of the record of this same case. It also considered (though it would not have been bound to do so under its practice) affidavits that accompanied petitioner's original application for *habeas corpus* in that case. Upon its view of this entire record, it denied petitioner's application. Certainly that denial does not raise any question sufficient to evoke this court's writ of *certiorari.*

II.

Even if the Illinois Supreme Court had been bound to accept petitioner's allegations as true, they did not state a case of denial of due process.

The logic of constitutional principles and this court's decisions alike affirm the doctrine that due process is accorded when a defendant is fairly prosecuted by honest officials before an impartial court and an impartial jury, with no complicity on the part of any public official in the subornation of perjury or other ulterior methods of prosecution; and that this is true even though a witness may have testified falsely. It is the purity of public officials and of the tribunal, not that of non-official witnesses, that is required by due process.

Complicity of public officials in obtaining a conviction by perjurious or other unfair evidence denies due process. (*Mooney* v. *Holohan*, 294 U. S. 103.) But, conversely, absent misconduct upon the part of the state through its officers, the state does not deny due process because an honest prosecutor calls and an honest jury believes one who is later shown to be a perjurer. (See cases discussed below.)

The necessity that public officials must be implicated in the subornation of perjury or other fabrication of evidence in order to convict the state of lack of due process is made clear beyond peradventure by *Hysler* v. *Florida*, 315 U. S. 411, already cited for other propositions to this case under Point I, *ante*. In the *Hysler* case, this court said at page 420:

> "* * * In his final affidavit on April 9, Baker returns to the alleged promise of the State's Attorney that he would not 'burn' him. But there is this time no sug-

> gestion that the prosecutor induced or knew of any false testimony by Baker."

On page 419, the court further noted as a basis for affirming the Florida court, that "Even in this second affidavit [of the recanting witness Baker], there is no hint that the prosecutor had any knowledge of the falsity of his implication of Hysler." The court notices the following language from the opinion of the Florida Supreme Court:

> "The allegations of the petition do not show that the prosecuting attorney had any guilty knowledge of the alleged maltreatment of the witness [Baker] or that the alleged falsity of the testimony of the witness Baker was known to the prosecuting officer."

The dissenting opinion in the *Hysler* case, written by Mr. Justice Black and concurred in by Mr. Justice Douglas and Mr. Justice Murphy, likewise proceeded upon the assumption that misconduct on the part of public officials, not mere perjury on the part of a non-official witness, was necessary to vitiate the conviction for lack of due process. The dissenting opinion contains the following very significant statement by Mr. Justice Black, at page 423:

> "* * * I do not, however, regard this as a proper occasion to determine whether the rule of *Mooney* v. *Holohan* applies only where the guilty knowledge is that of 'the prosecuting officer' *and not any other responsible official.* * * *" (Emphasis supplied.)

The dissenting Justices in the *Hysler* case thought that Hysler's petition contained sufficient averments to call for a trial on the question whether the prosecutors introduced confessions which had been "wrung from the accused or his accomplices by third degree methods." No such charge is seriously made in the instant case. Thus the entire court agreed in regarding *official* misconduct as a necessary concomitant in denial of due process by the "State", to which alone the text of the Fourteenth Amendment applies.

Lisenba v. *California,* 314 U. S. 219, is likewise incisively pertinent. In that case this court held that a conviction resting upon testimony of accomplices, which testimony was given after inducements in the form of promises of leniency, did not deny due process.

The view that the lack of due process, when it exists in the case of a conviction resting on false or otherwise illicit evidence, must consist in the knowing fabrication or use of such false or illicit evidence by public officials is not a mere technical shibboleth to keep innocent men in the penitentiary. It is grounded upon the philosophical reflection that, while proved complicity of public officials in sending an innocent man to the penitentiary is ground for upsetting a conviction years after it has occurred, the protection of society from violence and other crime at the hands of its more vicious citizens demands that persons who have once been fairly tried by an impartial tribunal shall not be at liberty, years after their conviction, to procure recantation or other contradiction of the testimony of one of the witnesses and thereby compel society to retry the whole case after other witnesses have died, disappeared or forgotten the facts.

If a mere recantation of a witness is sufficient to open the doors of the penitentiary, then society is very much at the mercy of any convict who, though he makes no charge against the government that has convicted him, can procure evidence of recantation or other showing of perjury on the part of one of many witnesses who had testified against him.

There are many rules of evidence that, like the rule against hearsay evidence, close the eyes and ears of courts to evidence that, though it may be convincing and clearly true in a given case, is of a kind or *genus* that is inherently so easy of fabrication and so difficult of disproof that en-

lightened policy demands exclusion of such evidence as a type of *genus*. This is indeed the basis of nearly all of the exclusionary principles law of evidence except that which excludes proofs on the ground that they are irrelevant.

The enforcement of such a rule of evidence does not work a denial of due process of law.[5]

III.

Illinois may properly limit the time in which petitioner may assert claims of lack of due process in state courts.

This court need not, indeed, it can not properly reach in this case the question whether Illinois might limit the time of the assertion of federal constitutional claims by a statute of limitations shorter than that applied to the assertion of claims arising under the state constitution or other state law. Nor can this court properly reach the question whether, if Illinois closes her doors to affirmative legal proceeding at the instance of petitioner after five years, federal courts must or may, in the absence of positive congressional enactment to the contrary, apply the Illinois statute of limitations.

If this court should hold, contrary to the propositions advanced under Points I and II, *ante*, that the instant petition for *coram nobis* otherwise effectively charged denial of federal due process, only the following very narrow question would arise:

> May Illinois, by a statute of limitations not *per se* unreasonable in the length of time that it prescribes,

[5] Petitioner does not effectively charge the public officials in this case with complicity in his alleged "railroading." His petition does assert the conjecture that the public officials "could have known" of the alleged falsity of Factor's testimony. This averment is not only a mere conclusion. It is apparently groundless surmise. We therefore do not treat seriously this purely opinionative utterance of petitioner's pleader in the trial court.

limit the period within which affirmative action may be commenced by an Illinois convict to arraign Illinos authorities upon charges of denial of due process, or may Illinois remit such convicts to the vindication of their alleged federal rights in the federal courts?

In civil cases the law is plain that, while a state may not invidiously discriminate against causes of action having their genesis under federal laws, state statutes of limitation in general are applicable to action having their genesis in federal substantive law. Indeed this court holds that even where a civil action arises under a federal statute and is brought in the federal courts, it will be presumed that Congress intended such actions to be limited by the statute of limitations in the state where the federal court sits. *Pufahl* v. *Parks Estate,* 299 U. S. 217.[6]

This court has recently in effect sustained the invocation of a period of limitations for the assertion of substantial federal rights even though only federal statutes and federal courts were involved. In *Sunal* v. *Large,* ... U. S. ..., October Term, 1946, No. 535 (not yet officially reported), this court had before it the claims of an alleged conscientious objector that he had been denied the right to interpose proof of his religious convictions as a defense to prosecution under the Selective Service Act. He had

[6] It is not absolutely certain that the federal government can impose upon state courts the affirmative duty of entertaining any action for the vindication of purely federal rights. (Cf. *Kentucky* v. *Dennison,* 65 U. S. 66, holding that the act of Congress imposing duties upon a state governor is void.) One might inquire, for instance, what would be the result if a state failed to appropriate funds for the summoning of jurors, the pay of judicial and ministerial officers of the court and the like for service in actions instituted under federal legislation. This of course is very different from saying that, if the state does entertain an action based upon either state or federal rights, the state must accord due process in such action and that it must admit any defenses, e.g., a plea of discharge in bankruptcy, or a defense under the Soldiers' and Sailors' Relief Act, authorized by Congress.

been convicted in a district court and had not prosecuted an appeal. After the time for appeal had expired he sought *habeas corpus* on the ground, *inter alia*, that his time for appeal was barred by the five-day period within which a notice of appeal might be filed. (Rule III of Criminal Appeals Rules of 1933, 292 U. S. 661, enlarged to ten days by Rule 37 of Federal Rules of Criminal Procedure effective Mar. 21, 1946, 327 U. S. 857.)

This court held that inasmuch as he had not appealed within five days, his right to review of an admittedly substantial claim of federal constitutional rights was barred.

It is true that there is no statute of limitations explicitly applicable to *habeas corpus* in the federal courts; and it may well be that a state statute of limitations would not bind a district court where the Fourteenth Amendment was invoked by a state prisoner. But nevertheless the net result of the *Sunal* case was to limit by a period of five days the time in which an alleged conscientious objector could assert his claim of rights under the Fourteenth Amendment to the Constitution of the United States as well as under the United States Habeas Corpus Act and under the express terms of the Selective Service Act.

It is indeed difficult to perceive how this court could sanction a five-day period of limitations created by this court's own rules of criminal procedure as a constitutional inhibition upon the right of a federal prisoner to seek relief, yet strike down as unconstitutional a state's failure to entertain, after five years, affirmative action in the state court where the only rights claimed are federal rights and the federal courts are open for their assertion and vindication.

To the same effect precisely is *Goto* v. *Lane,* 265 U.S. 393, except that the period of limitation was not as brief as the five-day period involved in the *Sunal* case. In the *Goto* case, this court held that where a federal convict had failed to prosecute a writ of error within the time allowed by law, he was barred from asserting federal constitutional claims upon *habeas corpus.* And see also *Riddle* v. *Dyche,* 262 U. S. 333, to the same effect.

Of course these considerations are not pertinent if this court agrees with us (I) that the Illinois Supreme Court's decision rests upon an adequate non-federal ground and is based upon a record not before this court, or (II) that petitioner's allegations, even if taken as true do not effectively charge a denial of due process.

Conclusion.

For the reasons urged in this brief, it is respectfully submitted that the instant application for this court's writ of *certiorari* should be denied.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
208 South La Salle St.,
Chicago 4, Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General
Of Counsel.

APPENDIX I.

People v. Touhy, et al.
361 Ill. 332.
No. 22789, 22864.
Supreme Court of Illinois.
June 14, 1935.
Rehearing Denied Oct. 2, 1935.

JONES, Justice.

Roger Touhy, Peter Stevens, Albert Kator, Hugh Basil Banghart, Edward McFadden, William Sharkey, and Charles Connors were indicted in the criminal court of Cook county upon a charge of kidnapping John Factor for ransom. Touhy, Stevens, Kator, and McFadden were tried before Judge Feinberg. At the close of the evidence a nolle was entered as to McFadden. The jury did not agree upon a verdict, and was discharged. On a second trial the plaintiffs in error were found guilty. Banghart was tried separately before Judge Steffen and found guilty. Each of the verdicts fixed the penalty at 99 years in the penitentiary. Judgments were entered on the respective verdicts, and writs of error sued out as to each. The causes were consolidated in this court, but later, upon Banghart's application, the consolidation was vacated and the writ of error in his case was dismissed. Sharkey and Connors are dead. Stevens is often referred to in the testimony as Gus Schafer. Banghart frequently went by the name of Larry Green. None of the defendants testified on the trial.

John Factor testified he was kidnapped on the night of June 30, 1933, while leaving the "Dells," a roadhouse in the northwest part of Cook county. His party consisted of his wife, his son Jerome, his brother-in-law, Harold Cohn, Mr. and Mrs. Epstein and their son, Mr. and Mrs. Hyman and their daughter Catherine, and Charles Redlick. They started for their homes about 1 o'clock a. m., leaving in three cars. One of the cars was driven by Jerome Factor, with Epstein and John Factor as passengers.

About a block and a half east of the Dells three cars containing about a dozen armed men approached the Factor car and forced it to the curb. Members of the Factor party who were following came up, and they were compelled to get out of their cars and line up along the roadway. Factor and Epstein were taken out of the car in which they were riding and put into a car of the kidnappers and were blindfolded. After going a short distance this car turned to the right and Epstein was allowed to go. Factor was kept that night and the next day in the basement of a house called the "Glenview house." The next night he was taken to a farmhouse and kept there until July 12, when he was released upon a payment of a large ransom.

The evidence for the people shows that while Factor was in the basement at the Glenview house one of the men removed the handkerchief blindfold and replaced it with adhesive tape. Factor got a look at a man standing opposite him and identified him as Kator. At the farmhouse he recognized Banghart by his voice. Factor was directed to write a letter to his wife and the blindfold was removed. While he was writing the letter two men stood in front of the table with a blanket partly concealing them. He identified one of them as Roger Touhy. On the night before his release they told him his wife had $70,000 and asked if he could get $50,000 more provided they would release him. He agreed to get it in about a week or ten days. They talked over the method of sending the money, and arrangements were made to have Costner, one of the kidnappers, telephone Factor about it. Factor did not know Costner's name at that time but afterwards learned it in Baltimore. He identified Schafer and Sharkey as two of the men who captured him on Dempster street. After his release he received five or six telephone calls in reference to the balance of the ransom money. At one of the conversations arrangements were made for him to pay $15,000. Prior to that he had talked to Captain Gilbert, of the police, and two agents of the Department of Justice. They were always present with Factor during the telephone conversations. At the last telephone conversation it was agreed that the $15,000 should be sent by a messenger boy in a Checker cab. By arrangement with the authorities a dummy package was made up with $500

and given to two officers, one of whom was disguised as a Western Union messenger boy and the other as a taxi driver. They drove to an appointed place in Willow Springs and delivered the package to Banghart and Connors.

In August, after Factor was released, Captain Gilbert showed him a picture of Kator and told him he was an associate of Roger Touhy. Factor stated that it was the picture of the man he saw in the basement. In November he saw Kator after he was in custody. Factor identified the Glenview house as the house in the basement of which he was first held. He testified he was able to identify Touhy, Kator, Costner, and Banghart by their voices.

Jerome Factor identified a picture of Sharkey as one of the kidnappers. Mrs. Factor also identified it. Epstein and wife were unable to identify any of the kidnappers. James Reddick, Epstein's chauffeur, testified that he got a good look at one man's face and could recognize him, but had never seen the man since. He saw him about 10 o'clock that night at the Dells leaning against a car with a machine gun, and concluded he was one of the guards. He did not identify any of the other men. As he started out of the Dells yard with his party a car tried to beat him out. It was the car that cut Factor's car off.

Isaac Costner testified, in substance, that he came to Illinois from Tennessee between the 25th and 28th of June. He went to Park Ridge, Ill., to see Basil Banghart, whom he had known five or six years, and stayed with him that night. He knew, or became acquainted with, Touhy and his associates. He, Connors, Banghart, Touhy, Gus Schafer, and Kator frequented Jim Wagner's saloon. "The Touhy outfit" had two or three places to live. On the night of June 30 he was in one of their places. After he had gone to bed, three or four men, including Banghart, woke him up about 11 o'clock and said they wanted to grab Factor. He went with them to the Dells. They had three cars. He, Connors, Touhy, Schafer (Stevens), Sharkey, Banghart, Kator, Porkey Dillon, and some others whom he did not remember, were there. They parked their cars northwest of the Dells, on the roadway. A man who Banghart said was Silvers came out and reported on Factor. They stayed there some time, then drove out and parked their cars on the right side of Austin avenue, fac-

ing Dempster street. The same man again came over and described Factor and the car he would be in. When Factor and Epstein were captured Costner helped put them in one of the cars. Touhy and either Connors or Sharkey were in the back seat. When they took Factor into the house Costner stayed in the automobile. He slept at one of the Touhy houses that night. The next day he stayed with Factor in the basement of the house where the latter was confined. Two to four of the others were there, coming and going. About 10 o'clock that night they left in three cars, taking Factor along. Connors, Banghart, Touhy, Sharkey, Kator, Schafer, and some others whom he did not know, were there at that time. They went 50 or 60 miles, and close to midnight arrived at a farmhouse, where Factor was put to bed in a room on the second floor. Costner guarded him 10 or 12 days. Banghart and Touhy were there three or four times. Schafer, Kator, and Connors also came. In the presence of Banghart and Touhy, Factor wrote his wife that she should try to borrow up to $200,000, the price of his release. The men holding him were to get in touch with Dr. Soloway or Herman Garfield, with instructions how to deliver the money. Factor gave them his ring, his watch charm, and wrist watch as tokens to be delivered as proof that he was being held by those who were seeking ransom. After considerable negotiation, $70,000 was paid, and Factor agreed to pay $50,000 more for his release. Costner was to call him within two weeks. Factor was freed that night at La Grange. The next day Banghart gave Costner $2,400 in $20 bills and told him that was his share of the Factor money. According to the previous arrangement, Costner called Factor at two or three places on different occasions demanding the additional payment. Factor claimed it was difficult to get the money, and this conversation was reported back. On August 14, Factor agreed to pay $15,000 that afternoon at a place near the New York Golf Club, on the West Side, but did not do so. After three or four days Costner went to Tennessee and Banghart followed later. Then they went to Baltimore and lived there for a while. Costner was arrested on charges of robbery. Factor, learning of the arrest, went to Baltimore with a police officer. To the authorities in Baltimore Costner denied knowing anything of the kidnapping of Factor, but on be-

ing returned to Chicago he admitted his guilt and testified that the prosecuting attorney told him he would get some consideration for his testimony.

Walter Henrichsen testified that he rented the Glenview house at Touhy's direction. Prior to June 30 he was a guard in Touhy's yard at a salary of $40 a week. He did not go to work on July 1 or 2, and did not see Touhy from June 30 to July 4. He first met Costner the latter part of June, and saw him once or twice in July with Banghart in Wagner's basement, near Touhy's home. He also testified to several meetings of Touhy and his associates and armed trips at night with them. On July 5 and 6, at Touhy's direction, he picked Silvers up at the Dells and took him to the Commercial Club, where conferences were had with the defendants and some other associates. On July 12, about 12:30 or 1:00 o'clock, he and Jimmy Tribbles, accompanied by three other cars, drove to Twenty-Second street, near Wolf road, to collect the ransom for Factor. As he remembered, Dillon drove one car, Kator drove another, and Sharkey drove the one he was in. They met a man there who he believed was Dr. Soloway and received a suitcase from him containing the ransom. Tribbles had a machine gun and a pistol. They then went back to the Glenview house. He got out and brought Touhy over, telling him of the trip to Twenty-Second street. Tribbles took the suitcase into the house. Schafer, Banghart, Kator, Sharkey, Dillon, Connors, and another fellow that he did not know, were there. That night he and Sharkey were out together until about 1 o'clock. Sharkey was drinking heavily. The next day, Kator, Schafer, Connors, Tom Burns, Eddie McFadden, Tribbles, and Touhy were at Dillon's place all day, drinking beer. On July 14, at Dillon's, Touhy gave him $1,000 in $10 and $20 bills and told him he could buy a new car. At the first trial he testified that he had no idea the $1,000 could possibly be any part of the ransom money and did not tell anything about going out with Tribbles and Sharkey to get the suitcase, and did not mention Costner. He explained that he did not then know Costner's name and was trying to shield himself. It was not unusual for him to get money from Touhy to buy a car, and he had bought a number of them in the same way.

James Wagner testified that in May, 1933, he was in the roadhouse business about two and one-half miles north of Des Plaines on River road, about 600 feet south of where Touhy lived. Prior to that he had worked about six years for Touhy, driving a beer truck. Touhy and his associates frequented his place of business. On the afternoon of June 30, Kator, Touhy, Henrichsen, Schafer, Sharkey, Dillon, Connors, and Banghart were there. They came in about 3 o'clock and stayed until about 6:30. Henrichsen left about 6, came back about 7:30, and was still there at midnight. None of the others came back that night. On June 30 they talked in his presence, but he heard nothing about a plan to kidnap Factor.

Adeline Wagner, wife of James Wagner, testified she saw Touhy, Schafer, Kator, Sharkey, and McFadden leave her husband's place of business about 6:30 or a quarter to 7 o'clock on June 30. They left in about three cars.

Herman J. Garfield testified that on July 2 his telephone rang and somebody on the line said he was speaking for Factor and asked him to convey a message to Mrs. Factor demanding $200,000. Dr. Soloway, who lived at the Copeland Hotel, testified to a like communication.

Rudy Benitez, a bell boy at the Copeland Hotel, testified that on July 9, 1933, he received an envelope from a man whom he identified as Sharkey, with directions to deliver it to Dr. Soloway, and said there was no answer. The envelope contained something round inside. He delivered it at Dr. Soloway's door. On cross-examination he testified that he did not say at the former trial that Purvis told him he was going to show him the man that delivered the ring. Helen Kaylor, a court reporter, testified that he did make such a statement.

Dr. Solowoy testified that after several telephone communications on different days with the party demanding the ranson, it was agreed that he should deliver the $70,000. He followed directions, and on July 12 drove out Jackson boulevard to Des Plaines road, turned left to Twenty-Second street, and drove slowly to the right. A little car came up and one of the two men in it handed him a watch charm that belonged to Factor. The man had a machine gun in his lap and an automatic gun in his right hand. Dr. Soloway delivered the money and was

told that Factor would be released about 9 or 9:30 that night. He did not identify anybody with whom he communicated.

Edward McFadden, as to whom a nolle prosequi was entered, testified that he knew all of the defendants and was frequently at Touhy's house in Glenview, but that he never saw Costner in his life before the trial, and that he and Tribbles were in the Oak Park Hospital from the last Thursday in June until the second Saturday in July. He went to live at the Glenview house about the 15th or 16th of June. His son, Andrew McFadden, lived there. Neither Schafer nor Touhy came there.

Basil Banghart testified that he had been around Chicago from the latter part of June until the first part of July, 1933. During that time he did not see Costner, but that Costner came to his house in Park Ridge on July 19, 1933. He denied taking any part in the kidnapping of Factor or collecting the ransom money from Dr. Soloway. He was in Wagner's saloon a number of times, but Costner was not there. He fixed the date that Costner arrived in Chicago by reading in the paper the next morning about the arrest of Touhy and the men who were with him. In the early part of the evening of June 30 he was in Wagner's place. Touhy, Kator, Schafer, and Henrichsen were there. He thought Dillon was there. Connors and Tribbles were in a hospital guarding Tommy Touhy. At 10 or 11 o'clock he went home. The next morning he woke up rather late, when Costner came in the house. The witness corrected himself by saying he made a slip when he said Costner woke him up, for Costner was not there on July 1. He did not give Costner $2,400, and did not get any money along about that time, but lived on the money he got by stealing. On the evening of July 19, Costner unfolded a scheme to "shake Factor down" for more money, and said that he had heard Factor was supposed to pay off more money. He told Costner he would not be interested. They had conversations for a week or more about it. Costner told him that Factor was willing to pay off. They later met Factor, who told them he wanted to convince the government authorities and the crown attorneys that he had been kidnapped. He was to give $50,000 to "make it look good." It was to be

divided between Connors, Costner, and Banghart. Costner received $5,000 that day. Banghart made subsequent calls to Factor on the phone, and it was arranged that the money was to be delivered by two government men at Willow Springs. Costner told them the money would be brought to the place of contact in a cab by a Western Union messenger boy. Banghart and Connors drove to the place of contact and a package was handed to Banghart. The package proved to be a dummy containing $500. A police trap had been arranged, but Banghart and Connors escaped from it. Banghart admitted that in the state's attorney's office, before the trial, he denied knowing Factor, Roger Touhy, Tommy Touhy, Connors, Schafer, or Kator. Costner and Factor denied the meeting with Banghart, or any arrangement to send two friendly government men with $50,000 to make the kidnapping "look good".

Emily Ivins, a switchboard operator and a witness for the defense, testified she knew Mrs. Roger Touhy for fifteen years; that she lost her job on June 29 and the next day went out to the Touhy home, where she stayed until July 5. On the day she arrived she saw Touhy about 6 o'clock. He left right after dinner and returned about 11 or 11:30. They all sat on the front porch until they retired, about 4 o'clock in the morning. In rebuttal, Edward Schwabauer, a guard at Touhy's home, testified that on the night of June 30, 1933, he was in the yard all night, except about twenty minutes when he went next door to Wagner's for some beer. He did not see Touhy or Emily Ivins at the Touhy place and did not see Touhy around there the next night.

The material evidence has been set forth at length in this opinion because one of the grounds for reversal is that the defendants were not proved guilty beyond a reasonable doubt. That contention will be hereafter considered.

The defendants' attorney filed an affidavit alleging, among other things, that on the first trial, when the jury retired to consider their verdict, the judge orally instructed them that it was their duty to consult with their fellow jurors and arrive at an agreement, if possible; that after they had been out for a considerable time he sent them a written questionnaire requesting information as to the probability of an agreement, and that after they had been

out 25 hours he recalled them to the box and discharged them. It is claimed that the discharge of the jury was not with the consent of the defendants, and that it does not appear the jury could not agree upon a verdict. The defendants therefore say they had been in jeopardy, and they seek to interpose that defense. The record recites: "Jury return into open court and report they disagree. Order of court jury discharged from further deliberation in this cause and mis-trial ordered." It is not claimed that the jury were recalled to the box without previously informing the court of the disagreement. A jury in a criminal case may be discharged without a verdict whenever in the court's opinion there is manifest necessity for the discharge, or the ends of public justice require it. The exercise of that authority is within the sound discretion of the trial court and is not reviewable in the absence of abuse. Such abuse is not presumed by a court of review. People v. Simos, 345 Ill. 226, 178 N. E. 188; Dreyer v. People, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869. The affidavit does not show any abuse of discretion.

An application for a change of venue from the trial judge was refused. The record shows that prior to the first trial, the defendants, upon their petition, obtained a change of venue from Judge Miller, one of the judges of the criminal court to whom the cause had been assigned. Section 26 of the Venue Act (Smith-Hurd Ann. St. c. 146, § 26), provides that no more than one change of venue shall be granted to the defendant or defendants. While the statute allowing a change of venue should be interpreted so as not to defeat the rights conferred (People v. Scott, 326 Ill. 327, 157 N. E. 247), it cannot be so construed as to contravene its express provisions. Where the language of a statute is plain and unambiguous there is no room for construction and it must be given effect by the courts. Levinson v. Home Bank & Trust Co., 337 Ill. 241, 169 N. E. 193; Downs v. Curry, 296 Ill. 277, 129 N. E. 761. In People v. McWilliams, 350 Ill. 628, 183 N. E. 582, we held that upon a proper showing the defendant was entitled to a change of venue after a reversal of his conviction, but in that case there had been no prior change of venue. That holding is not applicable to the facts in this case.

An application was also made for a change of venue from the county on the ground that there exists a preju-

dice of the inhabitants against the defendants; that the first knowledge of such prejudice came to them on the day the application was made; that Factor had been fighting extradition to England, and that although the United States Supreme Court had affirmed an extradition order he has been able to remain out of custody; that one of the defenses to the kidnapping charge is that Factor was not, in fact, kidnapped, but arranged the affair to interest public officials in keeping him in this country; that the services of certain public officials were enlisted to prevent his extradition; that the Chicago newspapers continually carry articles concerning their activities; that by the liberal use of money Factor has associated himself with powerful underworld characters known as the "syndicate," and has influenced certain Chicago newspapers to refrain from referring to him as "Jake the Barber" and to refer to him as John Factor, wealthy speculator; that the newspapers have assumed the guilt of the defendants, and because of the natural prejudice against the crime of kidnapping have poisoned the minds of the inhabitants of the county against them; that a gang war existed in Cook county and the syndicate endeavored to exterminate Touhy and his associates by assassination, and that if the cause is transferred to another county the influence which might be exerted by Factor, the newspapers and the syndicate would not be so effective.

If it be accepted as a fact that the newspapers assumed the guilt of the defendants, the affidavit did not set out what was published or what were the activities of officials, or state any fact or facts which tend to show prejudice on the part of the inhabitants of the county. It is not claimed that Factor's alleged connection with the so-called syndicate or the alleged attempt to exterminate the defendants was ever brought to the notice of anybody in Cook county, nor is it to be assumed that the inhabitants are susceptible to the influence of the syndicate or of any group of gangsters. Whether or not prejudice exists in the minds of the inhabitants of a county is a question of fact, to be determined in the sound discretion of the trial judge. People v. Katz, 356 Ill. 440, 190 N. E. 913; People v. Cobb, 343 Ill. 78, 174 N. E. 885. No abuse of that discretion was shown.

Touhy, Stevens, and McFadden filed a motion to suppress as evidence certain guns on the ground that they were illegally seized, in violation of their rights under the State and Federal Constitutions prohibiting unreasonable searches and seizures (Const. Ill. art. 2, § 6; Const. U. S. Amend. 4). The guns, consisting of five pistols and revolvers and one rifle, were seized in Wisconsin on July 19, 1933, by officers of that state after Touhy, Stevens, and McFadden were arrested for reckless driving and running their car into a telephone pole. The guns were taken from their car upon their arrest. The rule in this state is, that where officers of the state charged with the prosecution of crime, conduct, by virtue of their office, an unlawful search and seizure, the evidence thereby obtained is not admissible against the defendant. People v. Castree, 311 Ill. 392, 143 N. E. 112, 32 A. L. R. 357; People v. Brocamp, 307 Ill. 448, 138 N. E. 728. The rule is not applied to evidence unlawfully obtained by others than state officers acting under color of authority from the state. People v. Castree, supra; People v. Paisley, 288 Ill. 310, 123 N. E. 573; Gindrat v. People, 138 Ill. 103, 27 N. E. 1085. Likewise the provision of the Federal Constitution against unlawful searches and seizures is not intended as a limitation upon other than governmental agencies. Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A.L.R. 1159; Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177. The seizure was not made or authorized by any officer of this state or by any federal agency. The court did not err in denying the motion to suppress the evidence.

The first trial began January 17, 1934, and lasted until February 2. The new trial did not begin until February 13. The principal grounds urged for a continuance of the second trial were that counsel did not have adequate time for preparation, and that he had not been paid for his services in the first trial, and time was needed for adjusting that matter. Pending the second trial, the court appointed the same attorney to represent the defendants who represented them at the first trial, and refused to permit him to decline the appointment. Manifestly, there was no basis for the claim of lack of time to prepare for the second trial. Moreover, the inability of counsel to arrange for his fees could not have been serious. Touhy was the

owner of considerable property including a large and valuable estate in Cook county. There was $2,700 in custody of federal officers which had not been identified as the proceeds of any crime, and this had been assigned to counsel by the defendants. Courts cannot be obliged to wait upon the payment of fees to counsel before bringing an accused to trial, otherwise many miscarriages of justice would result. The defendants were in nowise prejudiced by denying the continuance.

It is claimed that Costner's testimony as to the payment of $2,400 and the conversation about it with Banghart after Factor's release was incompetent, because a conversation out of the presence of the accused, after the termination of a conspiracy, is not admissible. The same claim is made as to the evidence of the police trap at Willow Springs, and it is pointed out that the defendants were then in custody on another charge. The evidence shows that the conspiracy had not terminated. It was a part of the agreement for release that $70,000 should be paid down and $50,000 more should be paid a week or ten days later. All the conspirators are deemed in law to be parties to all acts done by any of the other conspirators in furtherance of the common design. People v. Cohn, 358 Ill. 326; 193 N. E. 150; People v. Walinsky, 300 Ill. 92, 132 N. E. 757. The testimony was properly admitted.

Complaint is made by counsel for the defendants because he was not permitted to interrogate Costner in private prior to his going on the witness stand. Costner was brought from Baltimore to Chicago on February 17 and was called as a witness on the following Monday. Counsel suggested to the court that the name of the witness did not appear in the list given him by the state. The assistant state's attorney explained that when the case was called for trial Costner's whereabouts was unknown and the state was not then in possession of any definite information as to his connection with the case. Thereupon counsel for the defendants moved to withdraw a juror, and the motion was denied. Leave was asked for the defendants' counsel to examine the witness in private. The court offered to permit an examination provided it should be conducted in the presence of the assistant state's attorney or Captain Gilbert. At the end of a colloquy over the matter,

counsel interrogated the witness in the outer chamber of the court in the presence of Captain Gilbert. No prejudice to the defendants appears to have resulted in the action of the court. In fact, we know of no rule which would authorize the court to compel a witness to be examined in private by counsel for either side of a case, especially in the absence of the consent of the witness, and it is not intimated that Costner was either desirous or willing to be interrogated out of the presence of the court. There was no error in permitting the witness to testify. People v. Scott, 261 Ill. 165, 103 N. E. 617.

Clara Sczech was called by the court at the request of the people and testified that she was employed at the Glenview house by Henrichsen to cook one meal a day and straighten up after supper. Andy McFadden, Sharkey, and Tribbles lived there. Kator, Eddie McFadden, and Banghart frequented the place. She admitted making a sworn statement on October 26, 1933, that she had seen Touhy, Connors, and Schafer there, but testified she was so nervous she did not know what to do and made mistakes in her statement. She said she never saw Costner around the place, and that she never saw Factor or anybody else in custody there, and had never heard Factor discussed. It is urged that the court erred in calling her as a court witness. The state's attorney informed the court that prior to the first trial she had made a sworn statement in which she identified pictures of Touhy, Connors, Banghart, and Schafer; that she stated she had seen them at the Glenview house; that on the first trial she contradicted that statement and denied she had ever seen Touhy, Schafer, or Connors there; that she would persist in her denial; and that the state could not vouch for her veracity. In Carle v. People, 200 Ill. 494, 66 N. E. 32, 93 Am. St. Rep. 208, we approved the calling of an eyewitness to a crime for whose veracity the state's attorney could not vouch. Subsequently, in People v. Cleminson, 250 Ill. 135, 95 N. E. 157, a witness called by the court who knew nothing about the crime was subjected to a searching and scurrilous cross-examination on collateral matters. We said in that case that the practice of the court calling a witness at the request of either party should not be extended beyond the limits of the rule announced in the Carle Case, but we have never held that the power of a trial

court to call a witness is limited to the calling of an eye-witness. We have held the rule to be that a witness should not be called except where it is shown that otherwise there may be a miscarriage of justice. Where the state's attorney for some reason, of which he informs the court, doubts the integrity or veracity of a witness he is not obliged to call him, but the court may call the witness and allow him to be cross-examined by either side. The practice should not be extended further than this, and the cross-examination should be limited to the issues. People v. Daniels, 354 Ill. 600, 188 N. E. 886; People v. Rotello, 339 Ill. 448, 171 N. E. 540; People v. Johnson, 333 Ill. 469, 165 N. E. 235. Clara Sczech was employed at a rendezvous of the defendants, rented at Touhy's direction. She was connected with the house and with the defendants. The court was advised of sufficient reasons why the state's attorney could not vouch for her credibility. There was no error in calling her as a court witness.

It is complained that the defendants were not allowed to develop evidence relating to the previous kidnapping of Factor's son, his release without ransom, and the details of a gang war between the Al Capone gang and the Touhy gang concerning the illegal distribution of beer. It is urged that such evidence would tend to show that Factor was kidnapped by the syndicate or that the charge was falsely made in order to escape extradition. In connection with the gang war it is claimed that one of the people's witnesses identified a guard at the Dells as one of the kidnappers, and that the Dells was operated by the Capone gang. The witness did not identify one of the kidnappers as a guard. He testified that he saw the man leaning against a car in the Dells yard and "concluded" he was a guard. There is no other testimony even tending to show that the man was a guard at the resort. The evidence shows that Silvers, the man who twice came out and communicated with the kidnappers just prior to the capture, was in conference with Touhy and his associates on two days shortly afterward. Even though Factor's son was released without ransom from an earlier kidnapping through the efforts of members of the Capone gang, and even though there was a gang war over illegal beer territory, those facts would not tend to throw any light on the issues. It would rather tend to becloud them.

The court did not unduly limit the testimony in the respects complained of.

The instruction given by the court concerning the penalty for kidnapping is not subject to the criticism pointed out in People v. Rongetti, 331 Ill. 581, 163 N. E. 373. There the defendant was charged with abortion, and the instruction covered not only that crime but the crime of attempted abortion as well. The instruction here complained of does not cover two separate offenses. It merely defines the elements of the crime, and the jury could not have been misled by it.

The following instruction was given: "The defendants under the law are presumed to be innocent of the charge in the indictment and this presumption remains throughout the trial with the defendants until you have been satisfied by the evidence in the case beyond all reasonable doubt of the guilt of the defendants. * * * Throughout this case the burden of proving the guilt of the defendants beyond all reasonable doubt is on the State and the law does not require the defendants to prove their innocence."

It is objected that the instruction intimates the presumption need not prevail during the whole trial but only "until something happens." The instruction is unlike the instruction condemned in People v. Ambach, 247 Ill. 451, 93 N. E. 310, and the objection is unfounded. An instruction of similar import but in different language was approved in the Rongetti Case, supra. Instructions are given after the hearing of all the evidence and the arguments of counsel, and we are unable to see wherein the jury could have considered this instruction other than in connection with the whole case.

The court instructed the jury as to the meaning of reasonable doubt. We have often criticised the giving of a similar instruction because the term needs no definition, but thus far we have never held the giving of such an instruction to be reversible error.

An instruction advised the jury that they are the sole judges of the credibility of the witnesses and enumerated the general tests to be considered. It is objected that a different test is to be applied to accomplices, and that it was not within the province of the court to single out and

indicate that a witness may be corroborated or contradicted. This instruction is not subject to either criticism. The tests enumerated were applicable to the testimony of accomplices as well as other witnesses.

The next instruction dealt only with accomplices. It is: "Walter Henrichsen, Isaac Costner and Basil Banghart are persons defined by law to be accomplices to the crime charged in this indictment. The testimony of an accomplice is competent evidence but such testimony is liable to grave suspicion and should be acted upon with great caution. If the testimony of an accomplice carries conviction and the jury are convinced of its truth beyond a reasonable doubt they should give it the same weight as would be given to the testimony of a witness who is in no respect implicated in the offense and *the credibility of such an accomplice is for the jury to pass upon as they pass upon the credibility of any other witness.*"

The only objection made at the trial to this instruction by counsel for the defendants was, "that Basil Banghart does not come in the class of accomplice, not having been called by the State but having been called by defendants." It is argued that there should be a different rule applicable to Henrichsen and Costner, who took the stand for the people and confessed their guilt, than that applicable to Banghart, who testified for the defendants and denied his guilt. Although the term "accomplice" is generally applied to those testifying against their fellow criminals (Cross v. People, 47 Ill. 152, 95 Am. Dec. 474), an accomplice is one who is in some way concerned in or associated with another in the commission of a crime. Bouvier's Law Dict.; People v. Turner, 260 Ill. 84, 102 N. E. 1036, Ann. Cas. 1914B, 144; Cross v. People, supra. No reason is advanced, and none is apparent, why one who is in fact an accomplice should not have his testimony scrutinized carefully before it is relied on, no matter on which side of the case he testified.

It is urged that the portion of the above instruction which we have italicized renders it reversible error under the holding in People v. Rongetti, 338 Ill. 56, 170 N. E. 14. In that case the instruction was held to be erroneous because it charged the jury to pass upon the credibility of an accomplice in the same way as they pass upon the credi-

bility, of any other witness. The accomplice testified for the state, and the defendant had a right to have the jury instructed that his testimony should be put to a severer test than that which is applied to ordinary witnesses. The defendant was prejudiced by the omission to so instruct the jury, but in this case, Banghart, who is the only witness referred to in the objection, was a witness for the defendants, and if the jury were not required to apply strict scrutiny to his testimony the result would favor the defendants and they cannot complain of the error. Counsel for the defendants urge other objections to the instruction, but they were not included in the specific objection made in the trial court, and they will not be further considered.

Some of the evidence was circumstantial, and the court did not err in giving an instruction defining it. Nor was there any error in giving the instruction defining accessories. Some of the defendants who were not placed at the scene of the actual kidnapping by the people's witnesses were connected by the testimony with other phases of it, bringing them within the terms of the definition.

The jury were instructed that if they believed from the evidence, beyond all reasonable doubt, that any defendant in this case collected or attempted to collect ransom or money from John Factor knowing him to have been so seized or secreted for the purpose of collecting ransom, such defendant is guilty of kidnapping for ransom. The objection raised to the instruction in the trial court is, that it would include an accessory after the fact and is misleading. It is urged that under its language it is possible to connect the attempt to collect money at Willow Springs with the original crime. If the testimony is to be credited that incident was a part of the crime and those engaged in it were participants in the whole program. The instruction might well have been couched in better language, but it was not misleading, and there was no reversible error in giving it.

In addition to adopting five suggestions offered by the defendants, the court refused 32 others offered by them. Fourteen of the offered suggestions were on the question of the credibility of the witnesses and the weight to be accorded the testimony of accomplices. One was on the

failure of the defendants to testify. Others were on reasonable doubt. Each of these subjects and other suggestions offered were covered by other given instructions. We have often condemned the practice of giving numerous instructions upon the same subject. There was no error in refusing the suggestions.

An alibi suggestion offered by the defendants told the jury that: "If in view of all the evidence, the jury have a reasonable doubt as to whether either of the defendants was present but was in some other place when the crime was committed, they should give such defendant or defendants the benefit of the doubt and find them not guilty." It was not necessary for a defendant to be actually present at the kidnapping if he was otherwise a party to the crime. The suggestion was correctly refused.

After a careful consideration, we are of the opinion there was no reversible error in the giving or refusal of instructions.

In support of the contention that the evidence is not sufficient to show the defendants' guilt beyond a reasonable doubt, the sufficiency of the identifications and the testimony of the accomplice witnesses are particularly attacked. Several matters alleged to be discrepancies are urged. It is always to be expected that in a case where the evidence is as voluminous as this there will be some conflict in the testimony. The identifications are not disputed. The jury saw and heard all the witnesses, including the accomplices. The weight of the testimony was for the jury to determine. The evidence so overwhelmingly establishes the guilt of the defendants that the jury could not reasonably have arrived at any other verdict.

We have examined in detail the many objections and criticisms urged upon us, and find no reversible error. The question upon review is not whether the record is perfect, but whether the defendant has had a fair trial under the law, and whether his conviction is based on evidence establishing his guilt beyond a reasonable doubt. Where the error complained of could not reasonably have affected the result the judgment will be affirmed. People v. Cardinelli, 297 Ill. 116, 130 N. E. 355; People v. Haensel, 293 Ill. 33, 127 N. E. 181.

The effort to show partisanship and bias on the part of the trial judge is wholly unjustified. His rulings, in the main, were correct, and we find no prejudicial error in any of them. The defendants were accorded a fair trial, and the jury were justified from the evidence in finding them guilty beyond a reasonable doubt.

The judgment of the criminal court is affirmed.

Judgment affirmed.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947

No. 278

ROGER TOUHY,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR REHEARING

EDGAR B. TOLMAN,
THOMAS I. MEGAN,
HOWARD B. BRYANT,
Attorneys for Petitioner.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0563

SUBJECT INDEX.

Petition for Rehearing.

Cases Cited.

Rules of the Supreme Court of the United States Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947

No. 278

ROGER TOUHY,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR REHEARING

PREFATORY NOTE.

Under the present rules an application for rehearing after the Court has denied a petition for certiorari, seems somewhat anomalous. A petition for certiorari for the review of a specific judgment, is usually prepared with meticulous care. It is accompanied by a transcript of the pleadings, evidence, orders and judgment. It also presents in detail the history of important, complicated facts and court decisions and the controversies of law and fact which have arisen.

If the order of court merely denies certiorari, that order conveys to counsel no information of how the various controversies of law and fact were decided. Counsel cannot in such a situation point out error, points "overlooked", or contentions "misapprehended".

But the recent amendment to Rule 33 of this Court casts light on the view of this court as to what is considered to be the scope and purpose of a petition for rehearing when it is sought in the circumstances above portrayed.

After January 1, 1948 counsel may apply for a rehearing on ". . . substantial grounds available to petitioner *although not previously presented* . . .". What the Court has considered to be a good rule after January 1, 1948, ought not to be an unreasonable interpretation of the present rule in the shadowland domain of the present rule.

The petition for a writ of certiorari in this case was denied on October 20, 1947.

Now comes Roger Touhy, petitioner, by Edgar B. Tolman, Thomas I. Megan and Howard B. Bryant, his attorneys, and respectfully asks the Court for a rehearing of his petition for a writ of certiorari to the Supreme Court of Illinois to review the judgment of that court in the error *coram nobis* proceedings more fully described in the record and petition for certiorari, on file in the above entitled case.

I.

We raised the question as to whether or not the introduction of perjured testimony on the trial of the original indictment by a jury did not of itself vitiate the judgment of conviction. In addition to what was said on that point on pages 40-42 of our petition and brief in this case we desire to emphasize that point by reference to the pro-

position of law that where, by a petition for certiorari, unlawful imprisonment is shown by the introduction of perjured testimony, petitioner does not have to prove his innocence. All that is required in such a situation is that he show the probability that the perjured testimony vitiated the verdict and judgment.

Hawk v. *Olson,* 326 U.S. 271, 278-279.
See also *Pyle* v. *Kansas,* 317 U.S. 213, 215-216.
Smith v. *O'Grady,* 312 U.S. 329, 334.

In the case at bar the perjury is of such a character as to vitiate the verdict and judgment. The Attorney General on page 4 of his brief states that "The petition for writ of error *coram nobis* in the criminal court says that in October, 1934, 'Factor told Thomas C. McConnell, a Chicago lawyer, that he (Factor) had not been able to see anyone during the holding for ransom, on account of a bandage over his eyes, but that he swore to the identification of Touhy anyway' ", which means that Factor identified Touhy without any knowledge whatever. The Attorney General at pages 4 and 12 admits that this evidence was "vital if true". This indicates that there was "strong probability" that perjury had affected the verdict, and meets the requirement of the law in a situation such as this.

II.

On pages 42-44 of our petition for certiorari we pointed out that *Woods* v. *Nierstheimer,* 328 U.S., 211, was controlling in the case at bar. Perhaps in our effort to restate our contentions without obscuring the point in a multitude of words our point may have been over-simplified. An examination of the *Nierstheimer* case shows the exhaustion of all state remedies except resort to the remedy of error *coram nobis.* In this case also the record shows the exhaustion of all other remedies under Illinois

law and by this error *coram nobis* proceeding we sought to exhaust all remedies available under the state law. This we certainly have done unless this petition for rehearing is to be classed as a necessary step in the exhaustion of state remedies.

III.

There is another aspect of the *Nierstheimer* case, fully worked out in Mr. Charles P. Megan's "Suggestions in Support" (R. 18-19), namely that under the Illinois Constitution the statute abolishing the remedy of error *coram nobis* and substituting a simpler method for that remedy has at all times been considered a part of the *Civil* Practice Act; that when the legislature saw fit to adopt amendments to the Criminal Code, a different form of title to the act was required to be used making clear the intent that it should be considered as an amendment to the *Criminal* Code.

People v. *Murphy,* 296 Ill. 532.

Given a situation where the form of an amendment is susceptible of being interpretated as amending both the Civil Practice Act and the Criminal Code, we should have made the point that the statute so interpreted runs counter to the provision of the Constitution of Illinois, that an Act should deal with but one subject and that that single subject should be expressed in the title. True it is that the effect of the Constitution of Illinois on Illinois statutes presents a question of state law, but it does not present a statute available as a *remedy* to one unlawfully deprived of his liberty. The statute is one relied upon by the State to take away a remedy. In such circumstances is not the Court justified in wholly disregarding an unconstitutional statute which has deprived the petitioner of his rights under the due process clause of the Constitution?

IV.

In an endeavor to allocate and simplify the issues, in assigning the grounds for Federal jurisdiction, we formerly assigned only the grounds of denial by the state court of the right of petitioner to protection against the deprivation of his rights under the Federal Constitution to due process of law. That ground seemed so sufficient that no specification of conflict of decision or of the discretionary character of the court's treatment of this application was set out, although it was clearly deducible from the record and the petition.

May we now be permitted to assign as additional grounds for certiorari the fact that there is conflict of decision between the judgment of the Illinois Supreme Court and the decision in the *Nierstheimer* case.

Rule 38 (5a) indicates that this court will exercise its discretionary power to grant certiorari where a state court has decided a federal question of substance not heretofore determined by this Court or has decided it in a way probably not in accord with applicable decisions of this Court.

Since we did not specifically mention this rule in our briefs we feel it our duty to refer to it now. In the light of this rule and the importance of the questions involved, we ask the Court to exercise its discretionary power and grant a rehearing.

All of which is respectfully submitted.

EDGAR B. TOLMAN,
THOMAS I. MEGAN,
HOWARD B. BRYANT,
30 North La Salle Street,
Chicago, Illinois.
Attorneys for Petitioner.

November 12, 1947

CERTIFICATE OF COUNSEL.

Edgar B. Tolman one of the counsel for Roger Touhy, petitioner herein, hereby certifies that this application for a rehearing is made in good faith and not for delay.

.....

EDGAR B. TOLMAN.